Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TOPP

QUESTIONS PRESENTED

1. Should the court resolve the conflict among the circuits about Title VII coverage for persons who, though not directly employed, are directly affected and injured by the discriminatory/retaliatory practices of a covered employer?

2. Did the Second Circuit err in deciding that Lt. Cavuoto did not act under color of law in sexually harassing/assaulting Mrs. Kern?

3. Did the Second Circuit overlook the facts and authority supporting Mrs. Kern's 42 U.S.C. 1985(3) and 1986 claims?

4. Should a plaintiff be required to prove that a local union with more than 500 members has 15 or more employees to maintain an employment discrimination/retaliation claim?

5. When the international/parent union with 180,000 members intervenes in local union matters on issues relating to a pending claim of discrimination/retaliation against the local, is it, as well as the local, accountable for the discrimination/ retaliation?

6. Should this Court clarify the rights of individuals to bring sexual harassment claims under Title VII and §§1983, 1985(3) and 1986 because of the exceptional importance of the questions?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WENDY L. KERN,

Petitioner

v

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Wendy L. Kern (Mrs. Kern) respectfully prays

that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 15, 1996.

OPINIONS BELOW

The Second Circuit opinion is reported at 93 F.3d 38 (2nd Cir. 1996); it is reprinted in Appendix A attached hereto at 1a, infra.

The Second Circuit denied Mrs. Kern's Petition for Rehearing and Suggestion for Rehearing in Banc by order filed October 15, 1996. The decision is reproduced in Appendix B at 1b, infra.

JURISDICTION

Federal jurisdiction in the trial court was invoked under the Constitution of the United States, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3) and 1986, Title VII of the Civil Rights Act, 42 U.S.C. §2000(e)5(f), et seq., 28 U.S.C. §§1331, 1343, 2201, and 2202.

The decision of the Court of Appeals sought to be reviewed was issued on August 15, 1996. A timely petition for rehearing was filed on September 11, 1996. The petition for rehearing was denied by order of the Court of Appeals on October 15, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PERTINENT STATUES

Mrs. Kern's claims in this petition arise under the Constitution of the United States, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3) and 1986, and Title VII of the Civil Rights Act, 42 U.S.C. §2000(e), et seq. Pertinent excerpts of these laws are attached in Appendix C, at 1c.

STATEMENT OF THE CASE

Factual Background

Mrs. Kern sues pursuant to the United States Constitution, the First and Fourteenth Amendments, 42 U.S.C. §§1983, 1985(3), 1986, Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York State Civil Rights Law and state common law to recover for sexual harassment, sexual assault, conspiracy to deprive her of her rights, aiding and abetting discrimination/retaliation and retaliation for complaining, assault, battery, breach of contract, intentional infliction of emotional harm, prima facie tort, libel and slander. She claims that from the start of her employment (September 1992) for Respondent Lt. Daniel Cavuoto, a full time City of Rochester managerial employee and then President of the city firefighter's union,[1] Lt. Cavuoto engaged in constant, verbal, sexual harassment of her.[2] She rejected all of his advances.[3]

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1. The union defendants are Local 1071 (1071)of the International Firefighters Association (IAFF) and the IAFF.

2. Mrs. Kern alleges that the verbal harassment included Lt. Cavuoto's discussion of his extramarital sexual exploits and of his acquaintances, the lack of sex with his wife, and his indirect and direct propositions of her for sex.

3. From accounts Mrs. Kern gave her friend, Mary Ann Tomasso, she concluded he was setting Mrs. Kern up for a sexual encounter. Ms. Tomasso likewise believed Mrs. Kern had an alcohol problem; Mrs. Kern could not refuse alcohol. Ms. Tomasso was so concerned for Mrs Kern's safety that she advised Mrs. Kern not to go to lunch with Lt. Cavuoto any more, not to place herself in a position where alcohol would be consumed. Ms. Tomasso was so concerned about Mrs. Kern's safety that she started calling during the work day to inquire about her.

However, on December 30, 1992, while at work at the firefighter union office, Mrs. Kern alleges that Lt. Cavuoto, knowing she has an alcohol problem,[4] with the informed assistance of Respondent Eldridge[5], plied her with alcohol until she was drunk and unable to defend herself. Lt. Cavuoto sexually assaulted her while she was incapacitated from the alcohol.[6] Mrs. Kern had a swollen lip, and bruises on her lip, left leg and right foot as a result of the assault.

After consulting her doctor, talking with a psychiatrist and counselor[7] and making a report to the Rochester Rape Crisis Center, Mrs. Kern reported the ongoing sexual harassment and sexual assault to full time City of Rochester Fire Lt. John McMenemy and

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On December 30, 1992, the day of Lt. Cavuoto's physical assault on Mrs. Kern, Ms. Tomasso called Mrs. Kern at about 11:30 a.m. just before lunch to get Mrs. Kern's assurance that she had no plans to go to lunch with Lt. Cavuoto. Ms. Tomasso called Mrs. Kern again right after lunch, about 2 p.m., to confirm that Mrs. Kern was okay, that she had not gone to lunch with Lt. Cavuoto.

4. Mrs. Kern claims that she told Lt. Cavuoto in October 1992 that she had a drinking problem. Thereafter, he repeatedly offered her alcohol at work and/or at work related lunches. He chided her about learning "to drink."

5. Mr. Eldridge is a retired City of Rochester Firefighter. He is currently in business with Lt. Cavuoto. At the times in question, Lt. Cavuoto and Mr. Eldridge operated their fire safety business in an office adjacent to the union office where Mrs. Kern worked.

6. Mrs. Kern claims that Lt. Cavuoto opened the door when she was using the restroom in the union office before leaving to pick up her children. He backed her against the wall as she resisted his advnces. She passed out, awaking on the floor of the union office, disrobed from the waist down and with Lt. Cavuoto getting off her, disrobed from the waist down.

7. The therapist contacted the Rochester Police Victims Assistance office on January 5, 1993 on behalf of Mrs. Kern.

union treasurer on January 19, 1993. She signed a complaint for Lt. McMenemy with the understanding that he would investigate[8] and follow up on it.[9] At all times relevant, the unions' constitution and by-laws provided for processing of misconduct complaints against union members and/or officers.[10]

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8. Lt. McMenemy's investigation included his talking with Ms. Tomasso about the assault and both the New York State Division of Human Rights and the EEOC about sexual harassment complaints and the obligation to investigate them. He obtained a copy of the City of Rochester/Fire Department Policy 251, Preventing Sexual Harassment. The policy, in pertinent part provides that the City is absolutely liable for acts of sexual harassment by its managerial personnel; responsibility extends to sexual harassment of others of co-workers and non-employees where the City/Fire Department knew or should have known of the conduct but did not act.

9. Lt. McMenemy also signed Mrs. Kern's complaint stating, "1. I take her complaint seriously, and it is my belief that the Executive Board of Local 1071 will be equally concerned. 2. I have made no judgment of fact for or against Wendy or Cavuoto. Each will be treated fairly in this matter. 3. As an officer of Local 1071 who has been informed of her complaint, I will fulfill my obligation to investigate it. 4. I expect her co-operation in this matter, and I will consult with her before taking any action 5. I will report fully to her on what I discover her rights and our obligations to be."

10. Misconduct is defined in the International constitution and by-laws as including:

"A. Refusal or failure without justifiable cause to comply with or abide by the provisions of this Constitution and By-Laws, the valid decision of any officer or officers thereof or the valid decisions of the Executive Board or those of the Association convention, or the valid provisions of applicable constitution and by-laws of local unions, state or provincial associations or joint councils.

* * * *

I. Committing any physical assault upon any officer, member, representative or employee of the Association or of any subordinate body thereof while such person is engaged in the performance of his duties for the International or subordinate unions.

* * * *

On February 24, 1993, Mrs. Kern and her attorney met with City of Rochester Police (RPD) and Victim's Assistance personnel to file a criminal complaint against Lt. Cavuoto. Mrs. Kern co-operated fully with City police personnel in making her complaint, noting that the matter was sensitive since the accused was a Lt. in the Fire Department (RFD) and the RFD employee union president. It was understood that the complaint would be kept confidential until City Police Detectives[11] had the opportunity to confront Lt. Cavuoto.

Nevertheless, police personnel permitted the "leaking" of the complaint information to a retired firefighter and the public. Lt. McMenemy, fearing for Mrs. Kern's safety at work after Lt. Cavuoto learned of her charges, told her not to report to work at the union

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J. Engaging in conduct detrimental to the best interests of the Association or its subordinate unions which places or tends to place them in disrepute with other labor organizations, employers, or the public.

* * * *

L. Conduct unbecoming a member of this Association, provided, however, that utilization of this provision shall be valid only when the charges are set forth in specific terms specifying the act or acts or conduct alleged to be unbecoming a member." International Association of Fire Fighters, AFL-CIO-CLC, Constitution and By-Laws as Amended August 1992, pages 91-93.

The International constitution provides in Article XVI that the accused member or officer is to be notified of the charges. A hearing on the charges by an impartial hearing board is mandated within 120 days of the charges. See Article XVII. The constitution of the International union charges the International General President with insuring strict observance of the International Constitution. See International Constitution pages 34 and 35.

11. Mrs. Kern has evidence that city police personnel who were assigned to take her complaint against Lt. Cavuoto were/are his friends. She was unaware of this relationship until after Lt. Cavuoto had been "tipped off" about her criminal charge.

office.

As a result of the Local union's failure to agree to working conditions to insure Mrs. Kern's safety thereafter, February 25, 1993, was the last day she was at work.

On February 26, 1993, Lt. McMenemy informed City Deputy Chief Griffin about Mrs. Kern's complaints and his investigation. He likewise informed Fire Chief Ippolito.

Mrs. Kern alleges that Fire Chief Ippolito is a friend, ally and supporter of Lt. Cavuoto. She has corroborated these allegations with the affidavit of Lt. McMenemy. After the complaint in this case was filed, Chief Ippolito was suspended by the City for using "bad judgment" as Fire Chief. This bad judgment included his placing a Fire Fighter Officer friend of his against whom there were substantiated charges of sexual harassment of a subordinate in charge of sexual harassment instruction for the RFD. An involuntary retirement for Chief Ippolito followed the suspension.

Lt. McMenemy attempted to keep his promise to Mrs. Kern and process her complaint under the Local 1071 and IAFF by laws and constitution. He was blocked by Lt. Cavuoto and his allies from doing so at the March 2, 1993 union meeting.. Thereafter, the IAFF, although fully informed of Mrs. Kern's claims and her request for Lt. Cavuoto to be charged and tried under the 1071 and IAFF by laws and constitution, assisted Lt. Cavuoto in his moves to keep his allies in the 1071 board positions and the presidency and worked against Lt. McMenemy who supported the by laws and constitution

process.[12]

On March 16, 1993, Fire Chief Ippolito told Lt. McMenemy that he was "...in big trouble" because of taking Mrs. Kern's complaint. He told Lt. McMenemy that his city career was in jeopardy and his union position would be lost if, "...the members [of the union] find out what you did." Immediately thereafter, Chief Ippolito denied Lt. McMenemy a promotion to City Fire Captain that Chief Ippolito had promised him in December 1992. Mrs. Kern claims that this action is retaliation against her. Additionally, Lt. McMenemy promptly filed discrimination/retaliation complaints against the City and union.

Mrs. Kern claims that the City of Rochester through its fire and police personnel knew or should have known of Lt. Cavuoto's making uninvited and unwanted sexual advances to her and to other women. Mrs. Kern corroborated her allegations with an affidavit of city employee and union treasurer, Lt. John McMenemy, who states that Lt. Cavuoto's reputation for womanizing was/is well known. Lt. Cavuoto has openly stated in city fire halls to other city employees that he selected Mrs. Kern for sexual gratification. "I hire my secretaries with fast hands and slow lips." Mrs. Kern also submitted affidavits of two other women, one who states Lt.

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12. In violation of the IAFF Constitution and by laws, General President Whitehead canceled the Local 1071 election in March 1994 at the request of Lt. Cavuoto and without notice to Lt. McMenemy and the candidate he was supporting. Thereafter, Mr. Whitehead caused Local 1071's financial records to be taken from Lt. McMenemy during the subsequent election to disadvantage Lt. McMenemy and the candidates he was supporting. In both elections, Lt. Cavuoto and his candidates campaigned against Lt. McMenemy and his supporters in part because Lt. McMenemy had taken Mrs. Kern's complaint.

Cavuoto sexually assulted her in a RFD parking lot and one who confirms his sexually harassing conversation to women during the work day.

Mrs. Kern claims that the Local union knew or should have known of Lt. Cavuoto's sexual harassment of her and of other women. She corroborated those allegations with the affidavit of Lt. McMenemy confirming that city employees and union members friendly to Lt. Cavuoto serving on the union executive board supported Lt. Cavuoto with knowledge of his preying on women for sex.

Mrs. Kern claims that the IAFF was informed of her complaints about Lt. Cavuoto's sexual harassment/sexual assault on her and although it had/has a duty to act, has failed to act. She corroborated these allegations with copies of the IAFF and local constitution and by-laws which provide that the IAFF must hold the local strictly accountable for following the IAFF constitution and by-laws. As noted above, she offered proof that the IAFF has a by-laws procedure to bring charges against any union officer who assaults or abuses an employee in any fashion; she, with the assistance of city employee and union treasurer, Lt. McMenemy, attempted to use this process to charge Lt. Cavuoto; the IAFF has supported Lt. Cavuoto knowing of Mrs. Kern's charges and of the retaliation Lt. Cavuoto has taken against Mrs. Kern and Lt. McMenemy.

Mrs. Kern claims that her complaints to the local union have resulted in retaliation against her. First the local union refused to provide a safe work environment after the assault; then Lt.

Cavuoto caused her termination.

Mrs. Kern claims that the City of Rochester failed to take any action on her complaints against Lt. Cavuoto. Rather city police personnel[13] placed her life/personal safety at risk when they prematurely leaked information to a retired firefighter and the public that she had made a criminal complaint against Lt. Cavuoto. She alleges that the City has retaliated against, is retaliating against her and Lt. McMenemy by denying him a promised promotion to captain after he assisted her by taking her complaint to the RFD.

Mrs. Kern has corroborated her allegations of city responsibility for Lt. Cavuoto's acts with proof that the city, as a matter of policy and practice, exercises control over the lives and conduct of city firefighters on and off the job. Thus the city has warned and threatened further discipline for off duty firefighters who became involved in a bar fight. The city is pursuing discipline against an off duty firefighter who argued with suburban firefighters about the way to handle a spill in a mall parking lot. The city has unsuccessfully sought in contract negotiations with Local 1071 to get indemnification from the union for the off duty conduct of fire fighters. The city policy on sexual harassment states the city is responsible for Lt. Cavuoto's conduct toward Mrs. Kern. Yet the city has done nothing about his outrageous conduct toward Mrs.

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13. City police failed to include in their reports of Mrs. Kern's complaints or their interview with her witness, Ms. Tomasso, the information furnished about Mrs. Kern's injuries from the sexual assault. Although the police were provided all of Lt. McMenemy's detailed investigation of the claims, none of this information was attached to the complaint papers. The police failed to attach a copy of Mrs. Kern's written statement of complaint to the "incident" report finally prepared. The police never processed an arrest warrant for Lt. Cavuoto.

Kern.

Procedural Background

The Second Circuit affirmed the district court's dismissal of all claims without any discovery holding that Mrs. Kern failed to show Lt. Cavuoto acted "under color of law," that she had failed to show the city engaged a custom or policy of discrimination as required by Section 1983, that she only alleged 1983 retaliation claims against Lt. McMenemy, that because the city was not Mrs. Kern's direct employer, there is no Title VII liability, that Mrs. Kern must show Local 1071 had at least 15 employees to be covered by Title VII and that Local 1071 has fewer than 15 when the union's non-officer board members are excluded. The Second Circuit did not discuss the Section 1985(3), 1986 claims or claims against the IAFF in concluding that other points raised on appeal were "without merit."

REASONS FOR GRANTING THE WRIT

POINT I - AN EMPLOYER COVERED BY TITLE VII IS LIABLE FOR DISCRIMINATION (SEXUAL HARASSMENT) AGAINST AN INDIVIDUAL (MRS. KERN) EVEN IF SHE IS AN EMPLOYEE OF ANOTHER EMPLOYER.

A. The court should resolve the conflict among the circuits on this elemental Title VII question.

When the Second Circuit dismissed Mrs. Kern's Title VII claims against the City, it placed itself in conflict with all other circuits which have uniformly held that the Congress meant what it said in Section 703(a) that any covered employer is liable for violations of Title VII to "any individual", even employees of another employer. See Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n. of New England, Inc., 37 F.3d

12, 17 (1st Cir. 1994)[14] - sole company shareholder, president, chief executive and employee has disability claim against company insurance carrier which limited and denied benefits after he had AIDS; Christopher v. Stouder Memorial Hosp., 936 F.2d 870, 875-76 (6th Cir. 1991), cert. denied, 112 S.Ct. 658 (1991) - hospital which denied a non-employee's work as a scrub nurse liable; Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291, 294 (11th Cir. 1988) - hospital alleged to have discriminated against an employee of another hospital is liable; Pardazi v. Cullman Medical Center, 838 F.2d 1155, 1155-56 (11th Cir. 1988) - hospital which denied a non-employee doctor staff privileges is liable for interference with employment with another corporation because staff privileges were required for the latter employment; Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411, 422 (7th Cir. 1986) - hospital which denies staff privileges to non-employee doctor liable for possible interference in the employment relationship between the doctor and his patients; Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019, 1021-22 (9th Cir. 1983) - hospital may be liable for interference with non-employee doctor's employment relationship with his company by denying contract to operate emergency room; Sibley Memorial Hosp. v. Wilson, 488 F. 2d 1338, 1341 (D.C. Cir. 1973) - hospital was liable for refusing to refer female patients to non-employee male private nurse; Puntolillo v. New Hampshire Racing Commission, 375 F. Supp. 1089, 1092 (D. N. H. 1974) - relying on Sibley to hold that since the racing commission and racetrack operator control assignment of stalls to non-employee horse owners, the commission and operator are liable under Title VII.

A claim such as Mrs. Kern makes that the City, through its top managerial employee, Lt. Cavuoto, sexual harassed her on

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14 While the First Circuit in Carparts was interpreting provisions of the ADA, the holding is directly applicable to this case since the ADA and Title VII employer definition provisions are identical. Compare 42 U.S.C. § 2000e(b) (Title VII) with 42 U.S.C. §12111(5)(A) (ADA). See also 29 C.F.R. Part 1630, App. (Interpretive Guidance on § 1630.2(a) - (f) (the term "employer" is "to be given the same meaning under the ADA that [it is] given under title VII").

the premises of another employer "...fits squarely within the language of Title VII, making it unlawful 'to discriminate against any individual....'" Pardazi, supra at 1156 (quoting 42 U.S.C. §2000e-2(a)(1)). "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone use of the very criteria for employment that Congress has prohibited." Sibley, 488 F.2d at 1341 (Emphasis added.)

Just as the City would be liable to Mrs. Kern if Lt. Cavuoto had sexually harassed her as a city employee, the city is also liable for Lt. Cavuoto sexually harassing her as a Local 1071 employee. The City is a covered employer whose managerial employee has sexually harassed/assaulted an individual, Mrs. Kern.

B. The control the City exercised over Mrs. Kern's employment was such as to make her a City employee.

The City permitted its top management employee, Lt. Cavuoto which it paid full salary and benefits, to work off site full time in the Local 1071 office and other locations that he chose. Mrs. Kern alleges that the City knew or should have known that Lt. Cavuoto was/is a womanizer and had sexually harassed other women. Contrary to the Second Circuit characterization, Mrs. Kern has a corroborated record that the City knew or should have known of Lt. Cavuoto's unlawful conduct. In his affidavit, Lt. McMenemy stated Lt. Cavuoto was known to be a "pig" and to have stated in City fire halls that he hires his secretaries "with fast hands and slow lips."

Thus, because of the City's inaction and/or failure to control or discipline Lt. Cavuoto, its top managerial employee, Mrs. Kern had a supervisor who constantly preyed on her for sex and thereafter assaulted her. Even after the City knew Lt. Cavuoto was alleged to have sexually assaulted Mrs. Kern, the City refused and continued to refuse to take any action - even to

investigate her claims.[15]

On the contrary, the City through its police personnel tipped off Lt. Cavuoto to Mrs. Kern's attempt to bring criminal charges against him, insuring that he could not be confronted by detectives with her charges, endangered Mrs. Kern's personal safety by prematurely "leaking" her contact with the RPD to the public, failed to complete full reports on the evidence Mrs. Kern and other persons provided to them, never processed any criminal charge for the sexual assault nor arrested Lt. Cavuoto. Moreover, when Lt. McMenemy acted on her behalf to bring Mrs. Kern's complaints to the attention of Fire Chief Ippolito, he immediately retaliated against Mrs. Kern and Lt. McMenemy by denying him a promised promotion to Fire Captain.

Full time City employee Cavuoto hired and eventually fired Mrs. Kern after she complained of his sexual harassment and sexual assault. City employee Cavuoto controlled the terms and conditions of Mrs. Kern's employment.

The Second Circuit correctly held in Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054, 1063 (2nd Cir. 1982), vacated on other grounds and remanded, 463 U.S. 1223 (1983), reinstated in relevant part on remand, 735 F.2d 23, 25 (2nd Cir. 1984) that the Title VII definition of employer "...is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer'..." Other courts have adopted this same reasoning.

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15 The City has an affirmative obligation to investigate and take appropriate action on sexual harassment complaints. Intlekofer v. Turnage, 973 F.2d 773, 780 n. 9 (9th Cir. 1992) - employer liable because the response was not likely to end the harassment; Paroline v. Unisys, Corp., 879 F.2d 100, 106 (4th Cir. 1989) - the adequacy of an employer's response to sexual harassment is a question of fact - plaintiff's evidence cast doubt on the effectiveness of the employer's response to sexual harassment; Brown v. City of Guthrie, 30 EPD Para. 33,031, p. 26,984 (D.C. Okla. 1980) - "...failure to investigate...[plaintiff's] complaints of sexual harassment and to deal appropriately ...makes it liable for the discrimination of its supervisor."; Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) - "...an employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination."

See Probe v. State Teachers' Retirement System, 27 F.E.P. Cases 1306, 1310 (C.D. Cal. 1981), aff'd , 780 F.2d 776 (9th Cir. 1986), cert. denied, 476 U.S. 1170 (1986); Barone v. Hackett, 602 F. Supp. 481 (D.R.I. 1984); contra, Peters v. Wayne State University, 691 F.2d 235, 238 (6th Cir. 1982).

C. Title VII prohibits retaliation against employees and others closely associated with them, i.e., third parties.

When Lt. McMenemy took Mrs. Kern's complaint, he told her he would "fulfill" his "obligation to investigate it". Mrs. Kern in turn promised in writing to cooperate with all investigations he pursued.

At Mrs. Kern's request, Lt. McMenemy took her complaint to Fire Chief Ippolito. Instead of investigating the complaint, Chief Ippolito immediately retaliated against Mrs. Kern[16] and Lt. McMenemy by sending the clearest message possible that the city tolerates gross sexual harassment and will punish those who complain - the City denied Lt. McMenemy promotion to Fire Captain.

Title VII prohibits reprisals against victims of discrimination as well as those who assist with their complaints and/or those who are closely related to the victim/complainant. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) - supervisor has Title VII suit on claim that he suffered retaliation when he failed to stop other employees from filing discrimination

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16 The Second Circuit at 13a infra describes Mrs. Kern's complaint in part as a complaint that the City retaliated against Lt. McMenemy. To the contrary, Mrs. Kern seeks to recover for the City's retaliation against her by the failure to promote Lt. McMenemy. She alleges that "...Lt. McMenemy's promotion was denied to interfere with plaintiff's rights to equal protection of the laws, to due process, to free speech, to complain about defendant Cavuoto's unlawful acts, to punish Lt. McMenemy for taking her complaint and to prevent by intimidation other city employees from assisting and/or cooperating with plaintiff's complaint."

Lt. McMenemy has testified that he took her complaints of sexual harassment/sexual assault to Chief Ippolito at Mrs. Kern's urging. She thought the City was responsible for the wrongful conduct. Mrs. Kern is complaining about injury in fact to herself. Warth v. Seldin, 422 U.S. 490, 499 (1975).

complaints; EEOC v. Ohio Edison Co., 7 F.3d 541, 545 (6th Cir. 1993) - plaintiff has Title VII suit when he claims he suffered retaliation after co-worker complained for him; Wu v Thomas, 863 F.2d 1543, 1547-48 (11th Cir. 1989) - husband has Title VII suit on claim the he suffered retaliation after his wife filed a discrimination claim against university where both were employed.

POINT II - LT. CAVUOTO ACTED UNDER COLOR OF LAW IN SEXUALLY HARASSING/ASSAULTING MRS. KERN.

The Second Circuit correctly held in Gierlinger v. New York State Police, 15 F.3d 32, 34 (2nd Cir. 1994) that "Section 1983 liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure the conduct becomes an accepted custom and practice of the employer." Not only does the City not dispute that its policy 251, Prohibiting Sexual Harassment, makes it absolutely liable for sexual harassment by its managers/supervisors, it does not dispute it has done nothing about Mrs. Kern's sexual harassment/sexual assault complaint.

Rather the City has acted affirmatively to exacerbate the unlawful acts and to affirm and condone the acts. Thus, with full knowledge of Mrs. Kern's complaints, City police neglected to note Mrs. Kern's injuries and other important information on their reports, they permitted the premature "leaking" of her complaint to the public, endangering her personal safety, they placed no criminal charge against Lt. Cavuoto.

Compelling evidence of the City's custom and practice of tolerating and condoning sexual harassment is their counsel's argument to the District Court that Mrs. Kern's claims are simply a "matter between a man and a woman." The City initially moved to dismiss and for summary judgment not only for itself but for Lt. Cavuoto in all capacities. The City briefed and argued on behalf of Lt. Cavuoto in the Second Circuit.

Lt. Cavuoto has a well known reputation for womanizing. He openly stated in City fire halls that he hired Mrs. Kern

because he wants a secretary with "fast hands and slow lips.'

When the City permitted Lt. Cavuoto to work at the Local 1071 office or other locations as he chose while paying him as a full time employee with full benefits, the City clothed him with both real and apparent authority to act on behalf of the City. Both the constant verbal sexual harassment of and the sexual assault on Mrs. Kern occurred during weekday, business hours while Mrs. Kern was at work.

A person's employment by a state or municipality is ordinarily sufficient to establish that the action was taken "under color of state law." It makes no difference whether the state actor is acting beyond the scope of his/her authority at the time. Wrongdoers "who carry a badge of authority of a state and represent it in some capacity" are liable under Section 1983. Monroe v. Pape, 365 U.S. 167, 172 (1961). See also, Flagg Bros. , Inc. v. Brooks, 436 U.S. 149, 157, n. 5 (1978).

The Second Circuit has correctly held that an employer is liable for sexual harassment if its supervisor uses his/her actual or apparent authority to accomplish sexual harassment or if the supervisor was aided by the existence of the agency relationship to carry out the assaults. Tomka v. Seiler, 66 F.3d 1295, 1307 (2nd Cir. 1995) - plaintiff established an issue of fact that an after work gathering of employees in a Rochester bar was company connected.

At 12a infra, the Second Circuit stated that Mrs. Kern "...fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy." Not only does Mrs. Kern have Lt. McMenemy's personal observation of Cavuoto's public womanizing, his knowledge of the close association between Cavuoto and Fire Chief Ippolito but she established that Chief Ippolito placed another officer friend against whom there were founded charges of sexual harassment in charge of sexual harassment training for the RFD. Mrs. Kern established that the City engaged in a custom or policy of ignoring sexual harassment claims in the past and continuing. It is uncontroverted that the City in Policy 251 acknowledges that it is liable for sexually harassing acts of its top management. Yet the City, consistent with its custom and policy of ignoring sexual

harassment complaints, has done nothing about Lt. Cavuoto's sexual harassment of her. No charges were ever brought against Lt. Cavuoto although Mrs. Kern made a criminal complaint to the RPD.[17] As noted above, the City detectives did not even make note of Mrs. Kern's injuries in their report nor did they attach the pertinent written statements of Mrs. Kern and Lt. McMenemy to the report.

Mrs. Kern submits that she has met the tests[18] to establish a custom or policy. With the evidence that Chief Ippolito appointed an officer who had engaged in sexual harassment to train RFD members she has proof that "'the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction.'" Gottlieb v. County of Orange, 84 F.3d 511, 518 (2nd Cir. 1996), quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2nd Cir. 1991). With the evidence that the City and/or Chief Ippolito never did anything about Lt. Cavuoto's well known womanizing either before or after Mrs. Kern's complaints, she has shown that the discriminatory practices of the city officials are "persistent and widespread" and constitute a municipal custom or usage. Sorlucco v. New York City Police Dep't., 971 F.2d 864, 870 (2nd Cir. 1992).

Government conduct which shocks the conscience is separately actionable under 1983 as a substantive due process violation. Rochin v. California, 342 U.S. 165, 172 (1952); Spear v. Town of West Hartford, 954 F.2d 63, 68 (2nd Cir. 1992). The conduct of the City shocks the conscience. While Mrs. Kern was stalked for sex by a high level City manager who conspired to get her drunk so he could obtain what she would not consent to if conscious, the City suggests that this is merely a matter between

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17. While the Second Circuit stated at 5a infra, "...the record does not indicate that Cavuoto was charged with any crime," it is uncontroverted that no arrest warrant was ever processed for Lt. Cavuoto.

18. A single act of a governmental decision marker can meet the "policy and custom" requirement. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). The City admits that Chief Ippolito is the final policy making authority for the RFD.

a man and a woman, ignores the assignment of Lt. Cavuoto's city police friends to "investigate" her criminal complaints, failed to note essential, important evidence supporting the criminal complaint, never processed an arrest for Lt. Cavuoto, and permitted its Fire Chief to retaliate against Mrs. Kern and Lt. McMenemy when he brought Mrs. Kern's complaint to him.

POINT III - THE COURT OVERLOOKED THE FACTS AND AUTHORITY SUPPORTING MRS. KERN'S 42 U.S.C. 1985(3) AND 1986 CLAIMS.

A. Section 1985(3) claims are stated against the City, Cavuoto, Ippolito, Eldridge and Local 1071.

In its decision, the Second Circuit did not discuss Mrs. Kern's well pleaded 42 U.S.C. 1985(3) claims which lie against the City, Cavuoto, Ippolito, Eldridge and Local 1071. Mrs. Kern need only show that two or more persons have engaged in a conspiracy to deprive her of her constitutional rights to have a cause of action against "...any one or more of the conspirators." 42 U.S.C. 1985(3). She need not show that the acts were those of a "state actor" or that the person acted "under color of state law." Griffin v. Breckenridge, 403 U.S. 88, 95-103 (1971).

Mrs. Kern alleges the particulars of the conspiracy in great detail. Lt. Cavuoto conspired with Mr. Eldridge to sexually harass/sexually assault her. She supports these allegations with proof that Lt. Cavuoto constantly associated with Mr. Eldridge at work. They frequently drank together. Both of them kept a book in the office on how to please women sexually. They kept a supply of liquor in the adjacent Life Safety offices.

The motive and intent of both Cavuoto and Eldridge is

established by the course of conduct preceding the sexual assault - the constant verbal sexual harassment by Cavuoto of Mrs. Kern, his badgering her to drink although she had told him she had an alcohol problem. Knowing of the ongoing sexual harassment, Ms. Tomasso knew Mrs. Kern was in danger at work before December 30, 1992. She made long distance calls to Mrs. Kern at work to check on her because of her well grounded fears.

Mrs. Kern can establish that Lt. Cavuoto and Mr. Eldridge enticed her to drink with them after she had declined to go to lunch with them on December 30, 1992. Lt. Cavuoto and Mr. Eldridge brought wine to her and when that was consumed, gave her mixed drinks. Mrs. Kern was drunk when she tried to leave to get her children and was forcefully kissed by Lt. Cavuoto and Mr. Eldridge.

After the sexual harassment/sexual assault, Mrs. Kern alleges the defendants conspired to suppress her complaints of sexual harassment/sexual assault. Lt. Cavuoto's friends were assigned to investigate her criminal complaint. They did not include in their report such essential information as the injuries she sustained in the attack nor did they attach to their report either her written statement or the written investigatory information provided to them by Lt. McMenemy. Lt. Cavuoto and Mr. Eldridge were "tipped off" about her complaint before each could be confronted by a police detective.

When Lt. McMenemy informed Chief Ippolito that he had taken Mrs. Kern's complaint against Lt. Cavuoto and was pursuing an investigation of it, Chief Ippolito told Lt. McMenemy

that he was in big trouble with the mayor, had jeopardized his City career and his position in the union (should the City firefighters find out what he had done). Chief Ippolito thereafter retaliated against Mrs. Kern and him by denying Lt. McMenemy his promised promotion to City Fire Captain.

Mrs. Kern has substantial evidence that Chief Ippolito is a close friend, ally and supporter of Lt. Cavuoto. Lt. McMenemy describes the "...direct connection between the running of the City Fire Department and the management of the union because Chief Ippolito was/is a close friend, ally and supporter of Lt. Cavuoto..."

These allegations state a claim of conspiracy under §1985(3). Dwares v. City of New York, 985 F.2d 94, 99, 100 (2nd Cir. 1993)(quoting 2A Moore's Federal Practice ¶8.17[6], p. 8-109, 8-110) - while a plaintiff should not plead "...mere evidence, he should make an effort to provide some 'details of time and place and the alleged effect of the conspiracy.'" The conspiracy pleading rules require a plaintiff to "...inform the opposing party of the nature of the conspiracy charged, with only as much detail as required to enable it to respond intelligently..." Id. Additionally, "...the pleader should be accorded some leeway, since the nature of conspiracy is such that the details may not be available when the pleading is prepared." Id. (Footnote omitted.) See also, Weise v. Syracuse University, 522 F.2d 397, 408 (2nd Cir. 1975) - plaintiff's allegations that discriminatory actions were taken against her by the defendants collectively and in concert with invidious intent is sufficient.

It is important to note that the Second Circuit dismissed these claims without permitting Mrs. Kern to obtain any of the discovery she had requested. Discovery in conspiracy cases is essential "Because conspiracies are carried out in secret, direct proof of agreement is rare." Kraemer v. Grant County, 892 F.2d 686, 689, 690 (7th Cir. 1990).[19] Summary judgment should be entertained only after there has been adequate time to complete discovery. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, fn.5 (1986). Respondents' conspiracy was a conspiracy to deny Mrs. Kern her right as a woman to equal protection of the laws.[20] Mrs. Kern as a woman shares this right with all women as a class.

In West Hartford v. Operation Rescue, 991 F.2d 1039, 1048 (2nd Cir. 1993), the court held that women are entitled to the protections of §1985(3) under the standards noted by this Court in Bray v. Alexandria Women's Health Clinic, 506 U.S.

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19. After the district court had severed and dismissed Mrs. Kern's state claims and after she had refiled the state claims in state court, Mrs. Kern obtained some admissions from respondents in state court. These include the admissions that Lt. Cavuoto grew up in the same neighborhood as the city detectives who "investigated" Mrs. Kern's claims. Lt. Cavuoto has known these detectives since childhood. Both Lt. Cavuoto and Mr. Eldridge admit that prior to December 30, 1992 (the date Mrs. Kern was assaulted), Mr. Eldridge knew Lt. Cavuoto had a book on how to please women sexually in the Life Safety office. Mr. Eldridge admitted that he had placed the "Hi Danny" note on the cushion on the sofa bed in the Life Safety office. These facts were provided to the district court as a part of Mrs. Kern's motion to supplement the record. The district court found the facts to be "irrelevant" and denied the motion.

20. A state and/or a municipality or responsible supervisors deny a woman equal protection of the laws when they fail to investigate and/or take appropriate action in connection with complaints of sexual harassment. Gierlinger v. New York State Police, 15 F.3d 32, 34 (2nd Cir. 1994)

____ , 113 S. Ct. 753(1993).[21] Courts have expressly held that women are a covered class under §1985(3).

See for example, Volk v. Coler, 845 F.2d 1422, 1435 (7th Cir. 1988)- allegations that company employees conspired to retaliate against a woman for claims of sexual harassment are actionable under 1985(3); Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984)- 1985(3) jury verdict for two women who claimed company employees conspired to deprive them of pay because of sex affirmed; Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979)- denial to women of equal access to disability insurance is actionable under 1985(3); Skadegaard v. Farrell, 578 F.Supp. 1209, 1219 (D.N.J. 1984)- woman who claims sexual harassment may sue under 1985(3); Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978) - woman claiming sex discrimination (denial of equal pay and constructive discharge) can sue under 1985(3).

Nor does Mrs. Kern need to allege or prove that the discriminatory treatment was practiced against all women to succeed on her 1985(3) claims. "Under the equal protection clause, however, Volk need not prove that an entire class was discriminated against....To make this showing, it is not necessary to show that all women employees are sexually harassed. Harassment of the plaintiff alone because of her sex is enough."

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21. Four justices of the Supreme Court held that sex is a suspect classification in Frontiero v. Richardson, 411 U.S. 677, 688 (1973). The Supreme Court held in United States v. Virginia, ___U.S. ___ (1996), 1996 U.S. LEXIS 4259, *31 that "official classification based on gender" must be "'exceedingly persuasive'" to be allowed.

Volk v. Coler, supra at 1433, 1434 quoting Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).[22]

B. Section 1986 claims are stated against respondent Eldridge.

Respondent Eldridge filed no brief with the Second Circuit contesting that the court below erred when it dismissed Mrs. Kern's claims that he violated Section 1986 when he failed to prevent Cavuoto's sexual attack on her or to aid her in any way. Respondent Eldridge did not have the benefit of any other respondents arguing in their briefs that the lower court's 1986 ruling is correct.

A person is liable for violation of 42 U.S.C. §1986 when that person had the "power to prevent or aid in preventing the commission of...[a wrong mentioned in section 1985 but who] neglects or refuses to do...[so]." Mrs. Kern has alleged sufficient facts for a jury to conclude that Mr. Eldridge knew exactly what Lt. Cavuoto had in mind by bringing a very large bottle of wine back to the union offices after Mrs. Kern had declined lunch with them. Mrs. Kern can prove that Mr. Eldridge was a long time business associate of Lt. Cavuoto and drank with him frequently. It is uncontroverted that the union and Life Safety offices were adjacent.

Mrs. Kern had before the court a corroborated record supporting these claims. Ms. Tomasso understood what Lt. Cavuoto had in mind for some time. She was so fearful of Mrs. Kern's imminent danger that she called on December 30, 1992,

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22. The Second Circuit cited Bohen with approval in Gierlinger, supra.

before and after lunch from her job hundreds of miles from Rochester to assure herself that Mrs. Kern was safe. Within an hour after Ms. Tomasso's last call, Lt. Cavuoto and Mr. Eldridge came back to the union office with a large jug of wine and proceeded to ply Mrs. Kern with alcohol and render her intoxicated. Ms. Tomasso's worst fears became reality. A jury can conclude that Mr. Eldridge knew of Mrs. Kern's danger and failed to act to prevent her harm.

POINT IV - LOCAL 1071 AND/OR THE IAFF ARE TITLE VII EMPLOYERS.

The Second Circuit's dismissal of Title VII claims against Local 1071 and the IAFF is based on its inaccurate findings at 17a, 20a, and 21a infra that a union employee need show the covered union employers have 15 or more employees rather than 15 or more members, that Local 1071 does not have 15 employees and that the IAFF employees cannot be counted with the Local employees.

A. A covered union employer need have only 15 or more members to be liable under Title VII.

In finding that Mrs. Kern need show her union employers had 15 or more employees rather than 15 or more members, the Second Circuit followed its new decision, Yerdon v. Henry, 1996 U.S. App. LEXIS 19872 (2nd Cir. 1996) where it rejected 20 years of well established EEOC interpretation and application of Title VII. The EEOC filed an amicus brief in Yerdon in support of its policy and regulation permitting Title VII claims against

unions with 15 or more members[23] regardless of the number of employees.

EEOC interpretations of Title VII are entitled to great weight. Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3073 (1986); Albemarle Paper Co. v. Moody, 422 U. S. 405, 431 (1975); Swartz v. Gordon, 761 F.2d 864 (2nd Cir. 1985). As long as the EEOC view is rational, the court will not substitute its judgment for that of the agency. Chemical Manufacturers Ass'n v. National Resource Defense Counsel, 470 U.S. 116, 125 (1985). The plain language of §703(c) prohibits a labor organization from sexually harassing its own employees.

B. Local 1071 and its parent, the IAFF, each have 15 or more employees.

Mrs. Kern claims that Local 1071 and its parent, the IAFF, each have 15 or more employees. But the Second Circuit found at 21a infra that eight Local 1071 non-officer board members (trustees) were not "employees" because they did not perform "...any traditional employee duties, such as maintaining records or managing the office" and that these persons were not "...responsible to anyone but themselves."

The office work performed routinely by these trustees was noted in great detail. See, for example, trustee Celento's summary of his work for June 1989 - picking up envelopes, hats and wine, buying supplies for picnic, returning supplies to office,

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23. Local 1071 has about 500 members; the IAFF has about 180, 000.

preparing thank you letters. Or see trustee Hess's September 1992 list for office deliveries. Or see trustee Cichotti's July 1995 summary - work on MDA picnic at office, pick up items for auction, shopping for MDA picnic at Sam's/Tops. From Local 1071 documents, Mrs. Kern prepared a listing of the routine office work done by the board members; she demonstrates that virtually all day-to-day office management and functions were performed by board members. Lt. McMenemy was prepared to testify that Local 1071 business is conducted by himself and other Board members 24 hours a day, seven days a week, 365 days a year, on and off the job, in and outside the union office.

The Second Circuit correctly held in EEOC v. Johnson & Higgins, Inc., 1996 U.S. App. LEXIS 19890 (2nd Cir. 1996) that directors of a corporation are also "employees" where the directors perform traditional employee duties. Just as the directors in EEOC v. Johnson & Higgins, Inc., supra were accountable to "senior members of the board", the trustees are accountable to Local 1071's officers. Consistent with EEOC v. Johnson & Higging, Inc., supra, Local 1071 is properly sued by Mrs. Kern.

C. Local 1071 is the agent of the IAFF.

In its decision, the court did not discuss the facts which establish that the IAFF has instigated, supported, ratified, encouraged or otherwise participated in the acts committed by Local 1071 or the individuals in this case. It is the **affirmative** conduct by the IAFF on behalf of Lt. Cavuoto, contravening its own constitution and bylaws, and taken with full knowledge of Mrs. Kern's complaint through Lt. McMenemy and knowledge

that its acts would assist Lt. Cavuoto and his cronies retaining control of Local 1071 that is the decisive evidence making the IAFF liable to Mrs. Kern and dictating the counting of its employees.

The IAFF has pledged to assist victims of sexual harassment as a signatory to the AFL-CIO sexual harassment statement. The IAFF is charged with insuring strict compliance by Local 1071 with the IAFF constitution and bylaws. The IAFF was required to hold Lt. Cavuoto accountable for Mrs. Kern's sexual harassment charges.

Notwithstanding its duty to act on her complaint, the IAFF has used its power affirmatively to support Lt. Cavuoto and keep him in power. It has done so when it has known that Lt. Cavuoto was trying to defeat Lt. McMenemy's re-election to Union office because he had taken Mrs. Kern's complaint. It has done so knowing its actions will assist Lt. Cavuoto and disadvantage Lt. McMenemy.

It is uncontroverted that as a part of the IAFF's "weighing in" on the side of Lt. Cavuoto, it canceled Local 1071's election in 1994, in violation of the IAFF constitution and bylaws. In 1994 and 1995, the IAFF took and kept Local 1071's financial records from Lt. McMenemy, Union Treasurer, knowing that this taking would disadvantage Lt. McMenemy in his union re-election campaign where his taking Mrs. Kern's complaint was an issue.

Because the IAFF is one and the same as Local 1071 or Local 1071 is its agent, IAFF employees, admittedly over 15, are

counted to meet Title VII requirements. See Rodonich v. House Wreckers' Union Local 95, 817 F.2d 967, 974-976 (2nd Cir. 1987) - affirming a jury verdict against an international union "...for having ratified Local 95's action with full knowledge of its unlawful character because the charges of slander were violative of LMDRA on their face," and finding district court jury instructions appropriate - "The International may be held liable with respect to a particular claim if you find that it instigated, supported, ratified, encouraged or otherwise participated in any act committed by Local 95 or the individual defendants." (Emphasis in the original.); NLRB v. Local Union 46, Metallic Lathers & Reinforcing Ironworkers, 727 F.2d 234, 237 (2nd Cir. 1984)- international liable under the National Labor Relations Act for ratifying the imposition of unlawful discipline through its internal appellate process. See also, Phelan v. Local 305, 973 F.2d 1050 (2nd Cir. 1992).

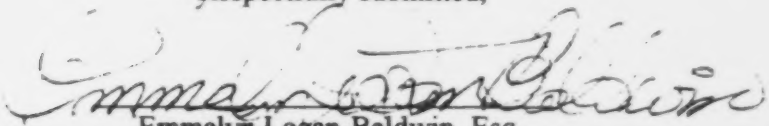
POINT V - THE ISSUES PRESENTED ARE OF EXCEPTIONAL IMPORTANCE.

The Supreme Court has described the elimination of workplace discrimination as a "policy 'of the highest priority.'" New York Gaslight Club v. Carey, 447 U.S. 54, 63 (1980). In a series of cases, this Court has held that sexual harassment violates Title VII and other civil rights laws. Recently, the Supreme Court held that a plaintiff need not show psychological harm to recover for a sexually harassing hostile work environment. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). The Supreme Court and Congress have amended Federal Rule of Evidence 412 to "...protect alleged victims [of sexual assault/sexual harassment]

against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping..." because of the "...strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim." Moore's Federal Practice 1996 Rules Pamphlet, part 2, page 167.

The Court should grant certiorari in this case to clarify the rights of individuals to bring sexual harassment claims under Title VII and §§1983, 1985(3) and 1986. A result that leaves an individual who has been sexually assaulted by a city manager and union president without a federal cause of action is clearly erroneous.

Respectfully submitted,



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January 10, 1997
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APPENDIX A

APPENDIX A

WENDY L. KERN, Plaintiff-Appellant, v. CITY OF ROCHESTER, FIRE DEPARTMENT, of the City of Rochester, POLICE DEPARTMENT, of the City of Rochester, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE, Defendants-Appellees.

Docket No. 95-9107

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

93 F.3d 38; 1996 U.S. App. LEXIS 20636; 71 Fair Empl. Prac. Cas. (BNA) 1391

May 16, 1996, Argued
August 15, 1996, Decided

PRIOR HISTORY: [*1] Appeal from a judgment of the United States District Court for the Western District of New York

(Telesca, C.J.) denying appellant's motions to amend her complaint to add claims under Title VII of the Civil Rights Act of 1964 and dismissing claims asserted by appellant under 42 U.S.C. @ 1983.

DISPOSITION: Affirmed.

COUNSEL: EMMELYN LOGAN-BALDWIN, Rochester, NY, for Plaintiff-Appellant.

CHARLES D. STEINMAN, Rochester, NY (Linda S. Kingsley, Corporation Counsel, Rochester, NY, of counsel), for Defendants-Appellees City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester, and Charles D. Ippolito.

BRADLEY A. SHERMAN, Culley, Marks, Tanenbaum, Capell and Pezzulo, Rochester, NY, for Defendant-Appellee Rochester Firefighters Association, Inc., Local 1071 IAFF.

ERICK J. GENSER, Washington, DC (Thomas A. Woodley, Mulholland & Hickey, Washington, DC, of counsel), for Defendant-Appellee International Association of Firefighters.

JUDGES: Before: MESKILL and MINER, Circuit Judges, and LASKER, District Judge. *

* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation. [*2]

OPINIONBY: MINER

OPINION: MINER, Circuit Judge:

Plaintiff-appellant Wendy L. Kern appeals from a judgment entered in the United States District Court for the Western

District of New York (Telesca, C.J.) denying her motions to amend her complaint and dismissing the complaint for failure to state claims upon which relief can be granted. Kern alleged in the complaint, inter alia, that defendants-appellees City of Rochester (the "City"), the Fire Department of the City of Rochester (the "RFD"), Daniel Cavuoto, and Charles Ippolito (together, the "City Defendants") were liable, pursuant to 42 U.S.C. @ 1983, for unconstitutional employment discrimination. In her first proposed amended complaint, Kern repleaded her @ 1983 claims against the City Defendants and added a cause of action for employment discrimination against the City Defendants and defendant-appellee Rochester Firefighters Association, Inc., Local 1071 IAFF ("Local 1071") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. @@ 2000e et seq. In the first of three Decisions and Orders, the district court found that Kern failed to state a claim under @ 1983, and that it would be futile to allow Kern to amend her complaint [*3] to add a Title VII action because she could not sustain a Title VII action against either the City Defendants or Local 1071. In her second proposed amended complaint, Kern alleged Title VII violations as her sole federal cause of action. In two subsequent Decisions and Orders, the district court again found that it would be futile to allow Kern to add a Title VII action and therefore denied Kern's motion to amend her complaint. On October 5, 1995, judgment was entered dismissing Kern's complaint.

For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

In September of 1992, Kern began her employment as a secretary for Local 1071. Local 1071 is the Rochester branch of the International Association of Firefighters and is the collective bargaining agent of the firefighters employed by the City. Kern's immediate supervisor was Cavuoto, the president of Local 1071. Cavuoto was a Lieutenant in the RFD, n1 and he also operated a private business known as "Life Safety" with his partner, Lloyd Eldridge. The Life Safety offices were located in the same building as the offices of Local 1071.

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n1 Pursuant to a contract between the City and Local 1071, Cavuoto was granted "release time" from his job with the RFD to allow him to perform his duties as president of Local 1071. However, Cavuoto still received full pay and benefits from the City as if he were a full-time employee of the RFD.

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[*4]

In her complaint, Kern alleged that Cavuoto sexually harassed her on numerous occasions between September and December of 1992. The alleged harassment initially consisted of Cavuoto's attempts to engage Kern in conversations of a sexual nature, but culminated in Cavuoto's physical assault of Kern on December

30, 1992. On that day, according to the complaint, Cavuoto and Eldridge invited Kern to "have a holiday drink" with them in the Life Safety offices. After consuming some wine, Kern claims that she began to feel "drunk and out of control." She excused herself and went to the bathroom located in the Local 1071 offices. Shortly thereafter, Cavuoto entered the bathroom and pushed Kern against the bathroom sink. Kern resisted Cavuoto's advances and then lost consciousness. According to Kern, when she regained consciousness, she was partially disrobed and lying on the office floor with Cavuoto standing above her naked below the waist. Kern immediately dressed and left the office. The next day, Kern reported the incident to the Rochester Rape Crisis Center.

Following the assault, Kern sought the assistance of the Rochester Police Department (the "RPD") and Local 1071. On January 19, [*5] 1992, Kern met with John McMenemy, who was the treasurer of Local 1071 and a lieutenant in the RFD, to discuss the alleged assault. McMenemy prepared a report of Kern's allegations, which was signed by Kern and McMenemy. McMenemy then provided the report to the City's Corporation Counsel, the executive board of Local 1071, and Ippolito, who at that time was the Chief of the RFD.

On February 24, 1993, Kern and her attorney met with representatives of the RPD to file a criminal complaint against Cavuoto. Kern was introduced to Detective D'Ambrosio and Investigator Ruvio, who told Kern that they would investigate her allegations. Although the detectives commenced an investigation, the record does not indicate that Cavuoto was charged with any

crime.

In March of 1993, McMenemy discussed Kern's allegations against Cavuoto with Ippolito. According to Kern, Ippolito told McMenemy that he was "in big trouble" for reporting Kern's allegations to the executive board of Local 1071, and that, not only was his career in the RFD in jeopardy, but also his union position would be lost if "the members [found] out what [he] did." Two days later, McMenemy was denied promotion to Captain in the [*6] RFD.

On June 28, 1993, Kern commenced the action giving rise to this appeal. In her complaint, Kern alleged, inter alia, that the City Defendants were liable under @ 1983 for violating her rights to equal protection, due process, and free speech. According to Kern, Cavuoto was liable under @ 1983 because he sexually harassed and assaulted her during her employment as his secretary, and therefore deprived her of her right to equal protection. Kern further claimed that the City was liable under @ 1983 because it had knowledge of Cavuoto's "womanizing," but failed to take any action to discipline him and therefore deprived Kern of her rights to equal protection and due process. Finally, Kern alleged that the RFD and Ippolito were liable under @ 1983 because they retaliated against her for complaining of Cavuoto's sexual harassment by denying McMenemy a promotion to Captain in the RFD, and thus deprived her of her First Amendment right to free speech.

On August 13, 1993, Kern moved to amend her complaint. In the proposed amended complaint, Kern added a cause of action

under Title VII against the City Defendants and Local 1071. Kern also repleaded her @ 1983 claims against the [*7] City Defendants. Thereafter, the City Defendants and Local 1071 moved, under Fed. R. Civ. P. 12(b)(6), to dismiss the complaint.

By a Decision and Order dated November 23, 1993, the district court granted the motions of the City Defendants and Local 1071 to dismiss Kern's complaint. The district court found that Kern failed to state a claim under @ 1983 against the City or the RFD because she was unable to plead any facts indicating that the deprivation of her civil rights was the result of a policy or custom. The district court also found that Kern failed to state a @ 1983 claim against Cavuoto because she failed to show "that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law." Finally, the district court dismissed Kern's retaliation claims, finding that she did not have standing to assert that McMenemy had been deprived of his civil rights on account of her complaint against Cavuoto.

The district court also denied Kern's motion to amend her complaint. The court found that the amendment would be futile because her Title VII claims would fail, since neither the City nor Local 1071 was an employer for purposes of Title VII. However, the [*8] district court granted Kern leave to move to file an amended complaint setting forth a valid cause of action under Title VII.

On January 19, 1994, Kern again moved to amend her complaint and also moved for reconsideration of the November 23, 1993 order. Her second proposed amended complaint differed

from the original complaint in that she did not allege any violations of @ 1983 and her sole federal cause of action was under Title VII. By a Decision and Order dated December 1, 1994, the district court denied Kern's motion to amend her complaint to add a Title VII cause of action against the City Defendants, but found that a hearing was necessary to determine whether Kern could sustain a Title VII cause of action against Local 1071. The district court also denied Kern's motion for reconsideration of the November 23, 1993 Decision and Order.

On August 14, 1995, an evidentiary hearing was held to determine whether Kern could maintain a Title VII claim against Local 1071. The only issue at the hearing was whether Local 1071 had the requisite number of employees to be considered an employer for purposes of Title VII. By a Decision and Order dated October 5, 1994, the district court found [*9] that Local 1071 did not have the requisite number of employees to be considered an employer for purposes of Title VII, and thus concluded that Kern could not make out a Title VII cause of action against Local 1071. Accordingly, a final judgment was entered dismissing Kern's complaint.

This appeal followed.

DISCUSSION

I. Section 1983 Claims

Kern first argues that the district court erred in dismissing her @ 1983 claim against the City Defendants. We disagree.

A. Claim against Cavuoto

Kern contends that Cavuoto is liable under @ 1983 because he

violated her right to equal protection when he sexually harassed and assaulted her while she was employed as his secretary. In order to state a claim under @ 1983, n2 a plaintiff must allege a violation of rights secured by the Constitution or laws of the United States, and that such violation was committed by a person acting under the color of state law. See Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency, 77 F.3d 26, 29-30 (2d Cir. 1996). Because we have held that sex-based discrimination, including sexual harassment, may be actionable under @ 1983 as a violation of [*10] equal protection, see, e.g., Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994), Kern adequately pleaded a violation of rights secured by the Constitution. The issue in dispute on this appeal is whether Cavuoto was acting under the color of state law when he allegedly deprived Kern of her right to equal protection.

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n2 Section 1983, in part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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The Supreme Court has stated that "the traditional definition of acting under color of state law requires that the defendant in a @ 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer [*11] is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)). "It is firmly established that a defendant in a @ 1983 suit acts under color of state law when he abuses the position given to him by the State." Id. at 49-50. Mere employment by a state or municipality does not automatically mean that a defendant's actions are taken under the color of state law. See Polk County v. Dodson, 454 U.S. 312, 319-20, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981).

The district court found that Cavuoto was not acting under the color of state law when he harassed and assaulted Kern. The district court noted that the complaint makes it clear that, although Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071's president during his contacts with Kern. Kern, nevertheless, argues that Cavuoto was acting under the color of state law because the sexual harassment and assault occurred while Cavuoto was receiving full-time pay and benefits from the City. Kern also claims that the fact that the harassment and assault occurred at Local 1071's offices, where Cavuoto regularly conducted business with city employees,

[*12] demonstrates that he was acting under the color of state law.

We think that Kern fails to demonstrate that Cavuoto "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting Classic, 313 U.S. at 326). First, Cavuoto did not hold his position as president of Local 1071 by virtue of any action by the City. Cavuoto was elected president by union members, irrespective of his position in the RFD. Furthermore, in his capacity as Local 1071's president, Cavuoto performed functions solely for the benefit of the union, not for the benefit of the City. Finally, while Cavuoto may have met with City officials in Local 1071's offices, this does not alter the fact that he did so in his capacity as president of Local 1071 and not as an employee of the RFD. Accordingly, we think that the district court properly dismissed Kern's @ 1983 claims against Cavuoto.

B. Claim against the City

Kern claims that the City is liable under @ 1983 because it knew of Cavuoto's "womanizing" and failed to stop it. Under Kern's theory, the City's duty to prevent Cavuoto's alleged womanizing [*13] arose from its supervisory relationship with Cavuoto. Kern claims that this relationship existed because the City paid Cavuoto a full salary and provided him with benefits while he was president of Local 1071. Even assuming that Cavuoto could be considered to have been under the City's supervision while he was the president of Local 1071, we think that the district court

properly dismissed her @ 1983 claim against the City.

We have held that, "in order to establish the liability of a municipality in an action under @ 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996). Furthermore, "'circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction,'" can support a finding that such a policy exists. Id. (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). The policy or custom need not be memorialized in [*14] a specific rule or regulation. Sorlucco v. New York City Police Dep't, 971 F.2d 864, 870 (2d Cir. 1992). However, when discriminatory practices of city officials become "persistent and widespread," they may be considered to constitute a municipal custom or usage. Id. at 870-71.

Kern argues that the fact that the City knew of Cavuoto's harassment yet failed to take any affirmative action to prevent Cavuoto from committing further harassment demonstrates a policy of support for the harassment. We think that Kern fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy. There is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever

complained about Cavuoto to the City or to Cavuoto's superiors at the RFD. Moreover, while Kern claims that it was well-known around the Firehouse that Cavuoto was a "pig" who had stated that he hires secretaries "with fast hands and slow lips," these assertions are wholly conclusory and are not sufficient to defeat a Fed. R. Civ. P. 12(b)(6) motion [*15] to dismiss. See Butler v. Castro, 896 F.2d 698, 700 (2d Cir. 1990) ("A conclusory allegation . . . without evidentiary support or allegations of particularized incidents, does not state a valid claim."). Accordingly, Kern's @ 1983 claims against the City properly were dismissed.

C. Claim against RFD and Ippolito

Finally, Kern claims that the RFD and Ippolito are liable under @ 1983 for retaliating against McMenemy by denying him a promotion to Captain in the RFD after he reported Cavuoto's harassment and assault to the executive board of Local 1071 and the RFD. We think that the district court properly found that Kern lacks standing to raise a @ 1983 claim on the basis of retaliation against McMenemy.

In Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), the Supreme Court stated that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499. In the present case, Kern does not argue that she personally was retaliated against by the RFD or Ippolito. Instead, she attempts to rest her retaliation claim on an alleged violation of McMenemy's civil rights. Because [*16] this is

precisely what Warth forbids, Kern's retaliation claim properly was dismissed.

II. Title VII claims

Kern argues that the district court erred by failing to allow her to amend her complaint to add Title VII claims against the City and Local 1071. We disagree.

Title VII provides, in relevant part, that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. @ 2000e-2(a). The term "employer" is defined in Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. @ 2000e(b). "Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Tadros v. Coleman, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir.), cert. denied, 498 U.S. 869, 112 L. Ed. 2d 149, 111 S. Ct. 186 (1990).

A. Claim against [*17] the City

In denying Kern's motion to amend her complaint to add a Title VII cause of action against the City, the district court found that the City was not Kern's employer under Title VII and that "there was no direct co[illegible] between the [City's] actions and the

claimed harm to [Kern]." While Kern concedes that she was not directly employed by the City, she claims that her job would not exist but for the employment of the firefighters for whom she works and the employment contract between the RFD employees and the City. Kern argues that, because of this connection, the City should be considered her employer for purposes of Title VII.

In support of her argument, Kern points to Spirt v. Teachers Insurance & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983). In Spirt, the plaintiff, a female professor at Long Island University ("LIU"), brought a Title VII action against two annuity fund management companies with which LIU had contracted to manage the retirement program for its employees. The plaintiff claimed that the companies violated Title VII by using sex-based mortality tables to calculate the benefits for plan [*18] participants. In determining that the companies were liable under Title VII, we stated that "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities." Id. at 1063 (quotation marks omitted). We went on to hold that, although the companies did not directly employ the plaintiff, the companies could be considered her "employer" under Title VII because the companies were "closely intertwined" with LIU in light of the fact that LIU delegated to the companies its responsibility to provide retirement benefits. Id. We also noted

that the finding of an employment relationship between the companies and the plaintiff was supported by the facts that the plaintiff's participation in the retirement program was mandatory and that LIU shared in the administrative responsibilities of the retirement program. Id.

Spirt, however, is distinguishable from the present case. First, Local 1071, unlike LIU in Spirt, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative [*19] responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071--and therefore her job--would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer. Therefore, the district court properly denied Kern's motions to amend her complaint to add a Title VII action against the City.

B. Claim against Local 1071

In denying Kern's motion to amend her complaint to add a Title VII cause of action against Local 1071, the district court held that, in order for Local 1071 to be deemed an "employer" within the meaning of Title VII and thus be amenable to a Title VII cause of action, it must have at least 15 employees. The district court,

following an evidentiary hearing, determined that "Local 1071 had only five employees during all times relevant to [*20] the complaint." Therefore, the district court determined that it would be futile to allow Kern to amend her complaint to add a Title VII cause of action against Local 1071.

Kern claims that the district court erred in two regards. First, Kern claims that the district court erred in holding that she must prove that Local 1071 employed at least 15 employees during the alleged discrimination in order for her to maintain a Title VII action against Local 1071. According to Kern, because Local 1071 is a labor organization, there is no minimum number of employees requirement to maintain an action under Title VII. In the alternative, Kern claims that the district court erred in determining that Local 1071 employed fewer than 15 employees during the alleged discrimination.

In support of her argument that she need not demonstrate that Local 1071 had 15 employees in order to maintain her Title VII cause of action, Kern points to the EEOC Compliance Manual, Volume II, @ 605, Appendix N. The manual explains that both labor organizations and employment agencies with fewer than 15 employees may be covered by Title VII if they regularly deal with employers covered by Title VII. According to Kern, [*21] because Local 1071 regularly deals with the City, an employer covered by Title VII, she need not demonstrate that Local 1071 has 15 employees.

We know of no federal court that has adopted this interpretation of Title VII. To the contrary, it consistently has

been held that, when a plaintiff brings a Title VII action against a union in its capacity as an employer, the plaintiff must demonstrate that the union meets the Title VII definition of "employer." On the other hand, if a plaintiff brings a Title VII action against a union in its capacity as a labor organization, the plaintiff must demonstrate that the union meets that statutory definition of a "labor organization." n3 See Yerdon v. Henry, 1996 U.S. App. LEXIS 19872, No. 95-7604, 1996 WL 438933, at * 6 (2d Cir. Aug. 6, 1996) (holding "a labor organization with fewer than fifteen employees cannot be sued as an employer for discrimination under Title VII of the 1964 Civil Rights Act"); Chavero v. Local 241, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986) (holding that "under Title VII a union can be both an 'employer' and a 'labor organization,'" and noting that "where . . . a plaintiff attempts to hold the union liable in its employer capacity, [the union] [*22] must fall under that definition, just as any other employer." (citation omitted)); cf. Herman v. United Bhd. of Carpenters & Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (holding that, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. @@ 621 et seq., which contains definitions of "employer" and "labor organization" that are virtually identical to those in Title VII, a plaintiff who sues a union in its capacity as an employer must demonstrate that the union meets the statutory definition of employer); Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-99 (5th Cir. 1994) (stating that an employment agency can be classified as either an employer or an employment agency, but, when it is sued in its capacity as an employer,

plaintiff must demonstrate that it meets the Title VII definition of employer). In the present case, because Kern is suing Local 1071 in its capacity as her employer, not in its capacity as a labor organization, the district court properly determined that Kern must demonstrate that Local 1071 meets the Title VII definition of an employer. This definition requires that Local 1071 have at least 15 employees. See 42 U.S.C. @ 2000e(b). [*23] Accordingly, we now turn to the issue of whether the district court erred in determining that Kern failed to demonstrate that Local 1071 had 15 employees.

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n3 42 U.S.C. @ 2000e(d) states, in part:

The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment . . . .

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The district court found that Kern and Local 1071's four officers--the president, the vice president, the secretary, and the treasurer--were the only employees of Local 1071. The district court explicitly rejected Kern's claim that the eight non-officer members of Local 1071's executive board, along with the sergeant-at-arms [*24] and three other persons who provided services to Local 1071, were employees for purposes of Title VII. Because Kern's claim necessarily rests on whether the district court erred in determining that the eight non-officer board members were not employees, we only address this issue.

Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. @ 2000e(f). Courts have held that directors or board members, while traditionally viewed as employers, can be considered employees depending upon their responsibilities within the business. See, e.g., EEOC v. Johnson & Higgins, Inc., 1996 U.S. App. LEXIS 19890, No. 95-6216, 1996 WL 446731, at * 12 (2d Cir. Aug. 8, 1996) (holding that directors of an insurance brokerage firm were employees for purposes of the ADEA because each performed traditional employee duties, worked full-time for the firm, and reported to senior members of the firm). In Chavero, the Seventh Circuit stated that, "although a director may accept duties that make him also an employee, a director is not an employee because he draws a salary. Rather, the primary consideration is whether an employer-employee relationship exists." 787 F.2d at 1157 (citations omitted). In [*25]

EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819, 78 L. Ed. 2d 90, 104 S. Ct. 80 (1983), the Sixth Circuit held that persons who were directors and officers could be considered employees under the ADEA because the individuals "performed traditional employee duties" such as "maintaining records, preparing financial statements, [and] managing the office." Id. at 1070.

In the present case, Kern fails to demonstrate that a traditional employee-employer relationship existed between the eight non-officer board members and Local 1071. The function of the eight non-officer board members was to represent their various constituencies on a board that made and directed the policy of Local 1071 and exercised general oversight over Local 1071's officers. There is no indication that any of the non-officer board members performed any traditional employee duties, such as maintaining records or managing the office. Moreover, there is no indication that the non-officer board members were responsible to anyone but themselves. Thus, the district court properly found that the non-officer members of Local 1071's executive board were not employees for purposes of Title VII. [*26] Without these eight members being considered employees, Kern is unable to demonstrate that Local 1071 had 15 employees. Accordingly, the district court correctly found that it would be futile to allow Kern to amend her complaint to add a Title VII action against Local 1071.

CONCLUSION

We have considered Kern's other contentions, and we find them

all to be without merit. In view of the foregoing, we affirm the judgment of the district court.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of October one thousand nine hundred and ninety-six.

Wendy L. Kern,

Appellant,

V

City of Rochester, ET AL.,

Appellee.

UNITED STATES COURT OF APPEALS
Filed
October 15, 1996
George Lange III, Clerk
SECOND CIRCUIT

Dkt No: 95-9107

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Wendy L. Kern.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no

such judge has requested that a vote be taken thereon.

SO ORDERED:
FOR THE COURT,
George Lange III, Clerk
By:
/s/ 10/15/96 /s/Arthur M. Heller
Date Arthur M. Heller
Administrative Attorney

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APPENDIX C

APPENDIX C

42 U.S.C. §1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985(3) Conspiracy to interfere with civil rights--Preventing officer from performing duties

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such

support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S. C. §1986 Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under

the provisions of this section shall be sustained which is not commenced within one year after the cause of action has been accrued.

UNITED STATES CONSTITUTION - FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION - FOURTEENTH AMENDMENT

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE VII - 42 U.S.C.§2000e(b)

Definitions

[Employer]

(b) The term "employer" means a person engaged in an industry

affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person...

Title VII - 42 U.S.C. §2000e-2(a)(1)

§703(a)

[Unlawful Practices of Employers]

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII - 42 U.S.C. §2000e-2(c)(1)

§703(c)

[Unlawful Practices of Labor Organizations]

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

No. 96-1190

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WENDY L. KERN,

Petitioner,

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department, and LLOYD ELDRIDGE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS' BRIEF IN OPPOSITION

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RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Procedural History of the Case

Petitioner Wendy Kern filed a Complaint in the U.S. District Court for the Western District of New York on June 28, 1993 against several named defendants, alleging

violations of her federal constitutional rights of due process, equal protection of the law, and free speech, as well as unlawful discrimination on the basis of sex. The Complaint also set forth a number of state law claims, including: discrimination on the basis of sex, assault, battery, breach of employment contract, slander, intentional infliction of emotional harm and prima facie tort.

Specifically, Kern alleged in her Complaint that after she became employed in September, 1992 as a secretary for the Rochester Firefighters Association, Inc., Local 1071 [hereafter referred to as "Local 1071" or "the Local"], the Local's president, defendant Daniel Cavuoto, frequently engaged her in unwanted conversations involving sexual content, engaged in acts of sexual harassment, and on December 30, 1992, physically assaulted her in the restroom within Local 1071's office. Kern also alleged that she then reported the December 30, 1992 incident to the Rochester Police Department, and that agents of the Department breached a public trust and confidence such that defendant Cavuoto learned that she had complained to the police. Kern further alleged that she also complained about defendant Cavuoto's conduct to John McMenemy, a lieutenant in the Rochester Fire Department and treasurer of Local 1071, who provided aid and protection to her against possible further harm. Kern contends that because of McMenemy's supportive actions, McMenemy was denied a promotion to fire captain by Rochester Fire Chief (and co-defendant) Charles Ippolito.

Notably, the *only* factual allegation in the entire Complaint specifically directed at the International Association of Fire Fighters [hereafter, "IAFF" or "the International"] is a speculative and conclusory assertion that

> "[u]pon information and belief, the parent union has been fully informed of defendant Cavuoto's conduct and plaintiff's complaints. Although it has a duty

> and responsibility to act when a local union president has violated the law, it has failed to act.

(J.A. 18, ¶ 54).[1]

As the *sole* cause of action against the IAFF, Kern asserted a claim under *state* law that it is liable in damages for aiding and abetting other defendants' acts of discrimination and/or retaliation. (J.A. 22, ¶¶ 76-79).

As their initial response to the Complaint, each defendant moved separately to dismiss the action. Kern filed a written opposition to each of these motions and at the same time cross-moved for leave to file an amended Complaint for the purpose of asserting (for the first time) a claim for relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

On November 23, 1993, the district court, per the Hon. Michael A. Telesca, issued a decision and order, which granted the dismissal motions of all defendants, and held that Kern's allegations based on federal law failed to state a claim upon which relief could be granted. (J.A. 686-693) Judge Telesca then denied Kern's motion to file an Amended Complaint as being an act of futility since the proposed Amended Complaint, on its face, failed even to allege a valid cause of action pursuant to the legal requisites of Title VII. (J.A. 693-695) Accordingly, in view of Kern's failure to allege any valid federal claim, Judge Telesca appropriately exercised his discretion pursuant to 28 U.S.C. § 1367(c)(3) and dismissed all of her state law causes of action (including the only cause of action alleged against the IAFF). (J.A. 696).

Kern subsequently submitted a new motion to file an Amended Complaint. However, the only federal claim

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[1] Citations in this form are to the Joint Appendix submitted on appeal to the U.S. Court of Appeals for the Second Circuit in the case below, *Kern v. City of Rochester*, 93 F.3d 38 (2d Cir. 1996).

alleged in the new proposed amended pleading was a Title VII claim against defendants Cavuoto and Local Union 1071; there was no claim asserted under 42 U.S.C. § 1985(3). Kern did not set forth a Title VII claim, or any other federal claim, against the IAFF, but merely realleged the same state law claim against the IAFF that was contained in her original Complaint. (J.A. 730, ¶¶ 70-73.

In a decision issued on December 1, 1994, Judge Telesca denied Kern's motion to file an Amended Complaint. In this decision, Judge Telesca noted that Kern was attempting to sue Local 1071 under Title VII *as an employer*, and held that she must therefore demonstrate that Local 1071 itself met the statutory definition of "employer". (J.A. 932). At the same time, because the resolution of this question involved a disputed issue of fact (i.e., whether Local 1071 employed 15 or more persons for each working day in each of 20 or more calendar weeks in the relevant year; *see* 42 U.S.C. § 2000e(b)), Judge Telesca ordered that a hearing be held to resolve this issue.

A hearing on this singular issue was held in the district court on August 28, 1995. Both Kern and Local 1071 presented detailed written proffers of evidence, affidavits, documentary exhibits and memoranda of law. Judge Telesca subsequently issued a decision and order on October 5, 1995 in which he concluded that, based on all the evidence, Local 1071 was not an "employer" within the meaning of that term under Title VII since it "had only five employees during all times relevant to [Kern's] complaint." (J.A. 1025). In reaching this decision, Judge Telesca thoroughly examined the relationship between the IAFF and Local 1071, and held that Kern had failed to meet her burden of proving that Local 1071 and the IAFF were a single entity or that Local 1071 was an agent of the IAFF. (J.A. 1025). He found that Local

1071 was a separate, autonomous entity that managed and controlled its own business affairs.

In a decision issued August 15, 1996, the Court of Appeals for the Second Circuit, without dissent, affirmed the District Court's rulings. The Second Circuit denied Kern's petition for rehearing and suggestion for rehearing en banc by Order dated October 15, 1996. No judge of the appellate court requested that a vote be taken on Kern's suggestion for rehearing en banc.

B. Statement of Facts Material to the Issues Involving the IAFF

The IAFF is an unincorporated labor organization with its offices and principal place of business in Washington, D.C. The membership of the IAFF is comprised of professional fire fighters employed by public and private sector employers in the United States and Canada. (J.A. 534, ¶ 3).

Rochester Firefighters Association, Local 1071, is an incorporated labor organization with its principal place of business in Rochester, NY. It is the collective bargaining agent of the fire fighters employed by the City of Rochester and its Fire Department. Local 1071 is a local union affiliate of the IAFF. (J.A. 534, ¶ 4).

The Constitution and By-Laws of the IAFF which sets forth the internal governing laws under which the International functions, including a provision empowering its President to interpret and apply said laws, ensures the autonomy of every local affiliate. The Certificate of Affiliation which is issued to each local union upon affiliation with the IAFF, also known as a charter, specifically reserves such autonomy to every local union affiliate (including Local 1071). (J.A. 534, ¶ 5).

Consistent with the policy of the IAFF and pursuant to the IAFF's Constitution and By-Laws, Local 1071 is

an autonomous, self-governing, separately chartered organization. Local 1071 and the IAFF have no common officers, no common treasury, and no common physical facilities. The IAFF does not control the day-to-day affairs of Local 1071, and has no authority to approve or disapprove any action Local 1071 might take (or has taken) as the collective bargaining or legislative representative of its members. In short, the IAFF has not at any time represented City of Rochester fire fighters in their employment relationship with the City or in their legislative or political activities on the local level. (J.A. 535, ¶ 7).

No agent of the International oversees the affairs of any local affiliate, and the International does not have the power to impose a trusteeship on its subsidiary bodies. The International transacts its business solely through its own officers and representatives. Under the International's Constitution and By-Laws, the local unions affiliated with the International are not empowered to, and do not in fact, transact the business of the International. Conversely, the International is not empowered to, and does not in fact, transact the business of its affiliated local unions. (J.A. 536, ¶ 9).

Local 1071 has at all times selected its own officers, agents and representatives pursuant to the provisions of its own local union constitution. It also chooses—without approval or confirmation from the International—its own staff employees. Local 1071 pays its expenses, including its employees' salaries and benefits, solely from its own funds, and its officers, agents, representatives and employees are responsible only to the membership of Local 1071. (J.A. 536, ¶ 10).

The members of Local 1071 establish procedures for the conduct of the local's affairs and business. They set initiation fees, reinstatement fees, monthly membership dues, assessments and any increases in the same. Local 1071, through its officers and/or members, determines

all the terms and conditions of employment of its employees. (J.A. 537, ¶¶ 11-12).

At no time has any officer, representative or employee of the IAFF controlled, dominated or directed the activities of Local 1071. At all times specified in both Kern's original Complaint filed in the district court and her proposed Amended Complaint (and at all times subsequent thereto up to the present) neither Local 1071 nor any of its current or former officers or members (including defendant Daniel Cavuoto) could have been, or were in fact, the agents, servants, employees or representatives of the International (or of the International's officers) and none of the alleged activities of any officer or member of Local 1071 was within the scope of any agency relationship with the International. (J.A. 537, ¶¶ 13-14).

The IAFF has never played any role or voiced any opinion regarding any aspect of Appellant Kern's employment relationship with Local 1071. No officer, employee or agent of the IAFF has ever assaulted, harassed, threatened, verbally abused or made public statements of any kind about Appellant Kern. Further, no officer, employee or agent of the IAFF has ever authorized, supported, or ratified such conduct. (J.A. 537, ¶¶ 15-16).

Contrary to Kern's bald assertions, prior to being served with Kern's initial Complaint filed in the district court, the IAFF never received any oral or written communication from any source about any prior acts of Daniel Cavuoto relating to sexual harassment and/or sexual propositioning of plaintiff Kern or of any other past or present employee of Local 1071. Similarly, the IAFF never received any oral or written communication from any source about any prior acts of Daniel Cavuoto relating to a physical assault against plaintiff Kern. (J.A. 538, ¶¶ 17-18).

Simply and accurately stated, the IAFF has had no interest or involvement whatsoever in Kern's employment relationship with Local 1071, and it has never entered

into any express or implicit agreements with any person or entity that would affect her employment in any way. (J.A. 539, ¶ 21).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT

Contrary to the petitioner's suggestion, there is no divergence of authority among the circuits as to whether an employee of a local union has standing to bring Title VII claims against an entity that is not her employer, but rather employs individuals who also happen to be members of the local union. Rather, all of the cases relied upon by Kern, as well as the decision of the Second Circuit below, require that to fall within the statutory definition of "employer" the entity must "significantly affect[] access" of the individual to employment opportunities. *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *quoted in Kern v. City of Rochester*, 93 F.3d 38, 45 (2d Cir. 1996).

For example in *Carparts Distribution Center v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994), an employee brought a claim under the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, against a trade association and its insurance plan in which the employee was a participant. The issue, as defined by the court, was whether the Association and Plan were so intertwined with Carparts so that they could be deemed the plaintiff's employer. Relevant to this inquiry is "whether defendants had the authority to determine the level of benefits that would be provided to Carparts' employees;" "whether Carparts shares in the administrative responsibilities that result from its employees' participation in" the Plan; and whether the defendants were agents of Carparts. *Carparts*, 37 F.3d at 17.

The decision of the Second Circuit, below, is entirely consistent with *Carparts* in that the Second Circuit looked at whether the City and Local were "closely intertwined" with respect to Kern's terms and conditions of employment. Specifically, the Court examined whether Local 1071 had delegated any of its employment responsibilities to the City; whether the City shared any of Local 1071's administrative responsibilities respecting employment; and whether the City had authority or control over other terms and conditions of Kern's employment with Local 1071 (and then concluded—correctly—that the record below provided no support for Kern on any of the purely factual issues). *Kern*, 93 F.3d at 45. Thus, there is no conflict between the Second Circuit's decision here, and that of the First Circuit in *Carparts*.

The remainder of the cases relied upon by Kern involve hospital settings where hospitals, by denying privileges and contracts,[2] refusing to refer patients,[3] or evaluating participants in a residency program,[4] significantly affected individual's access to employment opportunities at the hospitals. Again, this is the very standard adopted by the Second Circuit in *Spirt*, and applied by the Second Circuit in the instant case.

Moreover, one of the cases relied on by Kern, *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986), was recently *overruled* by the Seventh Circuit in *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7th Cir. 1996). In *Alexander*, the Seventh Circuit held that in deciding whether a hospital can be considered an em-

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[2] *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870 (6th Cir. 1991); *Pardazi v. Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988); and *Gomez v. Alexian Brothers Hosp.*, 968 F.2d 1019 (9th Cir. 1983).

[3] *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973).

[4] *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988).

ployer of a physician who has staff privileges, courts must apply an employee/independent contractor analysis, focusing on the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work. *Id.* at 492-93.

Thus, there is no conflict among the circuits with respect to this issue. Rather, Kern is attempting to manufacture a conflict, because the facts in this case plainly demonstrate that Local 1071 and the City are not closely intertwined with respect to Kern's terms and conditions of employment. As found by the court below:

> Local 1071 . . . has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment.

Kern, 93 F.3d at 45. Given these facts, no Circuit Court would likely find Kern to have standing to pursue her Title VII claim against the City. Succinctly stated, there is no divergence of authority among the circuits on this issue, and further review by this Court is unnecessary.

II. THE DECISION BELOW CORRECTLY HELD THAT IN ORDER TO SUE A LABOR ORGANIZATION AS AN EMPLOYER UNDER TITLE VII, THE LABOR ORGANIZATION MUST MEET THE STATUTORY DEFINITION OF "EMPLOYER"

Kern is urging this Court to overturn the well-established, logical principle that in order to maintain a Title VII action against a labor organization in its capacity as an employer, the labor organization must meet the statutory definition of employer (42 U.S.C. § 2000e(d), (e)). The argument put forth by Kern in this case has been uniformly rejected by every court that has considered

it, and there is no reason for this Court to review this settled statutory interpretation.

Kern, like others before her, relies exclusively on very old interpretations issued by the Equal Employment Opportunity Commission (EEOC) wherein that agency determined that jurisdiction lies over a labor organization in its capacity as an employer without the need to show that the organization actually falls within the statutory definition of "employer." The U.S. Court of Appeals for the Ninth Circuit recently addressed, and rejected, this very argument in the context of labor organization respondents in *Herman v. United Bhd. of Carpenters*, 60 F.3d 1375 (9th Cir. 1995), an ADEA case interpreting statutory language identical to that in Title VII.

In *Herman*, the Ninth Circuit concluded that "when a union is being sued in its capacity as an employer, it must meet the statutory definition of "employer" rather than some other statutory provision." *Id.* 60 F.3d at 1384-85. With respect to the dated EEOC interpretations, the *Herman* court found that "in the twenty-five years since those [EEOC] decisions, no federal court has adopted [the EEOC's] view." *Id.* 60 F.3d at 1384.

It is not surprising that the EEOC's position has failed to gain the acceptance of even one court. As the Ninth Circuit persuasively noted, a labor organization may have dual roles—it can function as a representative of employees and it can also function as employer. *Id.* This distinction is not to be overlooked, since there is no indication anywhere in Title VII that a labor organization, when sued by an employee for discrimination growing out of his/her employment with the organization, should be treated differently than any other employer. *Accord Greenless v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198-99 (5th Cir. 1994); *Chavero v. Local 241, Division of Amalgamated Transit Union*, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986).

A. Local 1071 and the IAFF Are Not So Closely Connected That They Can Be Deemed to Be a Single Entity, Nor Is Local 1071 the Agent of the IAFF

It is by now well-established that the appropriate legal test by which to determine whether the employees of two organizations can be counted together in order to satisfy the jurisdictional minimum under Title VII is a four-part test which examines the following factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial controls. (J.A. 1023-1024). *Herman v. United Bhd. of Carpenters, supra,* 60 F.3d at 1383; *Switalski v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers,* 881 F. Supp. 205, 208 (W.D. Pa. 1995), and cases cited therein. The relationship between Local 1071 and the IAFF is so attenuated that none of these factors are satisfied.

Clearly, the operations of Local 1071 and the IAFF are not intertwined even minimally. The IAFF presented affidavit testimony in the district court—unrebutted by Kern—providing that it does not in any way control the day-to-day business affairs of Local 1071. The Local has its own constitution, negotiates its own labor contracts, determines on its own how to resolve disputes with the City of Rochester, and shares no physical facilities with the IAFF. In short, in every aspect of its business dealings, Local 1071 acts independently of the IAFF.

Turning to the management of the two entities, it is also undisputed that the two organizations elect their own officers, and that there are no common officers between Local 1071 and the IAFF.[5] Accordingly, Kern

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[5] Kern's suggestion that the IAFF's decision to postpone Local 1071's March 1994 election establishes an agency relationship is without merit. The authority of the IAFF, found in its Constitution and By-Laws, to postpone a local union election in response to an election protest filed by a member does not establish an agency

was unable to prove (nor could she ever prove) the existence of common management.

As to the third factor—the degree to which control over labor relations is centralized—the undisputed record evidence below also showed that Local 1071 conducts its own labor relations without any direction or input from the IAFF. The Local determines, on its own, who to hire, what salary and benefits to give its employees, and all associated terms and conditions of employment of its employees.[6]

In addition, Kern's reliance on the charge and hearing procedures set forth in Articles XVI and XVII of the IAFF Constitution and By-Laws is clearly misplaced. Kern, as a non-member, has absolutely no legal basis for asserting any right to rely on these internal union procedures and obtain enforcement for her benefit.

Examining the final factor in the "single entity" test—common ownership or financial controls—there is no dispute that the IAFF and Local 1071 have separate treasuries. Local 1071 pays all of its expenses out of its own

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relationship. *See generally Childs v. Local 18, IBEW*, 719 F.2d 1379, 1382 n.2 (9th Cir. 1983). Moreover, the IAFF's decision to postpone Local 1071's March 1994 election was completely unrelated to Kern's employment relationship with Local 1071, and Kern has not—and cannot—provide any facts to the contrary.

[6] While Kern apparently attempts to show that the IAFF had some control over Local 1071's employee relations by asserting that the IAFF had a duty to discipline former Local 1071 president Cavuoto for misconduct, such argument is flawed in several respects.

Even aside from the fact that prior to being served with a copy of Kern's complaint in the district court the IAFF was never informed of any sexual harassment or assault allegedly committed by Mr. Cavuoto, it is well established that an international union has no duty to intervene in matters that are confined to the local union level. *See Phelan v. Local 305*, 973 F.2d 1050, 1061 (2d Cir. 1992); *Rodonich v. House Wrecker's Union Local 95*, 817 F.2d 967, 974 (2d Cir. 1987).

funds. Further, the Local determines the amount of its initiation fee, monthly membership dues and all other assessments. Accordingly, as is the case with the other three factors, common ownership is also absent.[7]

Kern fares no better in arguing that Local 1071 is the IAFF's agent. The unequivocal fact is that the IAFF Constitution and By-laws mandates that each local union affiliate shall have complete autonomy in conducting its day-to-day affairs. Each local affiliate—including Local 1071—elects its own officers, collects its own dues, maintains its own treasury, *hires its own employees,* pays its own expenses, and conducts its own business without having to first obtain approval or confirmation from the IAFF. In short, the IAFF is not empowered to, and does not in fact, transact the business of Local 1071 or any of its other affiliate locals.

Conversely, the IAFF transacts its business solely through its own officers and representatives. Under this same IAFF Constitution and By-Laws, local unions affiliated with the IAFF are not empowered to, and do not in fact, transact the business of the International. Hence, at no time has Local 1071 or any of its officers or members (including defendant Cavuoto) been the representative or agent of the IAFF, nor has any of the (mis)conduct allegedly engaged in by Local 1071 (or by Cavuoto) been within the scope of any authorized agency relation-

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[7] Kern contends that because the IAFF selected an accountant to audit the financial records of Local 1071—at Local 1071's request—such action indicates that the IAFF exercises substantial control over the financial affairs of the Local. While it is true that the IAFF has the authority to audit the books of its local affiliates, mere potential power such as this, the exercise of which is contingent upon the happening of some event (such as an express request from the Local) does *not* constitute the type of financial control that the "single entity" test contemplates. *See Switalski v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers,* 881 F. Supp. 205, 208 (W.D. Pa. 1995) (citing *Baker v. Stuart Broadcasting Co.,* 560 F.2d 389 (8th Cir. 1977)).

ship with the IAFF. Accordingly, no agency relationship exists. *See e.g., Boss v. Int'l Bhd. of Boilermakers,* 567 F. Supp. 845, 847 (N.D.N.Y.), *aff'd* 742 F.2d 1446 (2d Cir. 1983), *cert. denied,* 469 U.S. 819 (1984); *Childs v. Local 18, IBEW,* 719 F.2d 1379, 1382 n.2 (9th Cir. 1983); *Borowiec v. Local No. 1570,* 889 F.2d 23, 28 (1st Cir. 1989). In sum, Kern has failed to put forth any persuasive reasons for reviewing the Second Circuit's conclusion that Local 1071 is neither a single entity with, nor agent of, the IAFF.

Lastly, Kern is clearly mistaken in her belief that the issues presented in her petition are of exceptional importance. On the contrary, in this case the Second Circuit merely applied well-established principles of law to the uncontroverted facts and reached the unremarkable conclusion that Kern has failed to state any viable federal claim against any of the respondents.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 96-1190

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Did the District Court properly grant Respondent Local 1071's motion to dismiss Petitioner's 42 U.S.C. §1985(3) cause of action against Local 1071 and did the Court of Appeals for the Second Circuit properly uphold this determination?

2. Did the District Court properly dismiss Petitioner's 42 U.S.C. §2000e (Title VII) cause of action against Respondent Local 1071 for lack of subject matter jurisdiction, and did the Court of Appeals for the Second Circuit properly uphold such a determination?

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STATEMENT OF THE CASE

A. Statement of Facts

The facts of this case are set forth in the Decisions of the Western District of New York dated November 23, 1993, December 1, 1994 and October 5, 1995 and the Decision of the Court of Appeals for the Second Circuit dated August 15, 1996, and in the interests of brevity respondent respectfully directs the Courts attention thereto. (A. 1-49).

B. Course of Proceedings and Disposition of the Case Below.

Petitioner commenced an action against Respondents on June 28, 1993, alleging violations of 42 U.S.C. §§1983, 1985(3) and 1986 as well as state law, arising out of incidents alleged to have occurred while she was employed as a secretary by Rochester Firefighters Association, Inc., Local 1071, IAFF ("Local 1071"). After stipulating to an extension of time to appear, Local 1071 appeared by Notice of Motion for Summary Judgment, Or In The Alternative To Dismiss, dated August 10, 1993. All other named Respondents similarly moved.

Petitioner opposed the motion and cross-moved under FRCP 15 to amend her complaint to add a claim under 42 U.S.C. §2000e (Title VII).

By Decision and Order dated November 23, 1993, the United States District Court for the Western District of New York, Hon. Michael A. Telesca presiding, granted each of respondents' motions to dismiss and denied petitioner's cross-motion to add the claim for violations of Title VII. (A. 40-49). However, the Court did grant leave for Petitioner to file an amended complaint to include adequate allegations regarding the Court's subject matter jurisdiction over the Title VII claims as against Local 1071 and respondent Cavuoto.

By Notice of Motion dated January 18, 1994, Petitioner moved; (1) to amend her complaint to add a Title VII cause of action; (2) for the Court to reconsider its Decision and Order dated November 23, 1993 and; (3) to supplement the record. In support of her contention that there was subject matter jurisdiction over Petitioners Title VII claims, Petitioner advanced the argument that Local 1071 had more than 15 employees during her employment. Petitioner argued alternatively that she did not have to prove that Local 1071 had 15 or more employees based on its status as a labor union with 15 or more members.

By Decision and Order dated December 1, 1994, the District Court denied Petitioner's Motion in its entirety. (A. 31-39). The District Court properly held that Petitioner was an employee of Local 1071, and not a member of the union. Thus, she sued Local 1071 in its capacity as her employer, regardless of the fact that her employer happened to be a labor union. The District Court held that the determination of the issue of the number of employees for purposes of Title VII subject matter jurisdiction was a question for the Court to resolve, and further ordered that a hearing be held to resolve the jurisdictional issue of whether Local 1071 employed more than 15 employees during Petitioner's tenure.

A hearing was held on August 28, 1995 comporting with all due process requirements. (A. 20). By Decision and Order dated October 5, 1995, the District Court dismissed Petitioner's Title VII claims against Local 1071 for lack of subject matter jurisdiction. (A. 18-30). The District Court further dismissed Petitioner's state law claims under principles of pendent jurisdiction. Specifically, the Court held that Petitioner failed to meet her burden with respect to establishing that Local 1071 had 15 or more employees during the relevant time period. The Court rejected Petitioner's arguments that non-officer Executive Board Members of Local 1071 should be counted as employees, that two independent contractors and the union's attorney be counted as employees, and that the employees

of Respondent, International Association of Firefighter ("IAFF") be counted together with Local 1071's employees under a 'single-entity' theory.

Petitioner's Notice of Appeal dated November 3, 1995 sought review of the Court's Decision and Order dated October 5, 1995, the Judgment dated October 5, 1995 as well as the Decisions and Orders dated November 23, 1993 and December 1, 1994. By Decision and Order dated August 15, 1996, the United States Court of Appeals for the Second Circuit upheld in its entirety the decision of the United States District Court for the Western District of New York. (A. 1-17).

C. Correction of Misstatements in the Petition.

The Decisions of the Western District of New York and the Court of Appeals for the Second Circuit correctly set forth the facts of this case. (A. 1-49). However, pursuant to United States Supreme Court Rule 15.2, Respondent brings the following misstatements of facts contained in the petition to the Court's attention.

1. Petitioner misrepresents to this Court the events of, and subsequent to, the alleged encounter between Petitioner and Lt. Cavuoto. These allegations, plus the allegation that the Rochester Police Department Personnel permitted the "leaking" of Petitioner's complaint to a retired firefighter or the public, are unsupported by the record.

2. Petitioner also misrepresents to this Court that there is a conspiracy among the respondents to quash Petitioner's complaint. Again, both the District and Circuit Courts held that there is no merit to this argument and Petitioner has no evidence to support such an allegation. (A. 1-49).

3. Petitioner also misrepresents to this Court that Lt. Cavuoto conspired to keep certain individuals in their Local 1071 board

positions and to work against Lt. McMenemy in an attempt to circumvent the by laws and constitution. Again these are conclusory allegations for which Petitioner has no evidence.

All of these misstatements are conclusory allegations made by Petitioner which have no support in the Record. In fact, all such claims by Petitioner have been dismissed. (A. 1- 49).

REASONS FOR DENYING THE WRIT

According to Supreme Court Rule 10, a review of a writ of certiorari is not a matter of right, but rather a matter of judicial discretion. However, that rule does set forth a set of criteria which the Court may use in making its decision. Although this is a discretionary matter, this petition contains none of the aforesaid criteria. The decision of the court below is not in conflict with other Courts of Appeals, is not in conflict with any state court decision, and was not decided by a state court. See also, Braxton v. United States, 500 U.S. 344, 347 (1991). What Petitioner is seeking is a re-hearing of both the factual and legal issues that were decided by the courts below after a full hearing on those issues. As stated in Supreme Court Rule 10, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is exactly what the Petitioner is basing this petition on, and for that reason and those set forth below this Court should deny the petition.

I

The Court should deny the petition for writ of certiorari because the Decisions of the District Court and Court of Appeals gave full consideration to all of the issues and decided them correctly.

A. The courts below properly held that Petitioner had not pled a valid claim pursuant to 42 U.S.C. §1985(5).

The issue of whether Petitioner had correctly pled a claim pursuant to 42 U.S.C. §1985(3) was fully argued in front of the District Court. (A. 40-49). The Western District Court of New York in a Decision and Order dated November 23, 1993 held that Petitioner had failed to set forth and plead a claim pursuant to 42 U.S.C. §1985(3). *Id*. The Court held that the Petitioner made "no more than conclusory allegation[s] that there was a conspiracy to deprive her of her rights." Therefore, the Court dismissed this claim as against the Respondents. (A. 43 & 44).

This decision of the District Court, as affirmed by the Second Circuit, was in full accord with the caselaw. To properly state a claim under 42 U.S.C. §1985(3), the complaint must allege four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protections of the laws, or of equal privileges or immunities under the laws; (3) that the conspirators committed some act in furtherance of the conspiracy and; (4) that there was either injury to the person or property or deprivation of any right or privilege of a citizen of the United States. Griffen v. Breckenridge, 403 U.S. 88, 102-03 (1971). Finally, in pleading a claim under 42 U.S.C. §1985(3), the plaintiff must set forth in detail the time and the place of the alleged effect of the conspiracy. Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (quoting 2A Moore's Federal Practice p 8.17[6] at 8-109 to 8-110 [2d ed. 1992]). In order to sufficiently allege a conspiracy under 42 U.S.C. §1985(3),

the complaint must contain more that mere conclusory allegations. Id. Based upon this law, both Courts correctly held that Petitioner had failed to properly plead with the required specificity all the elements of a 42 U.S.C. §1985(3) claim.

The Western District did hold that Petitioner was free to move for leave to amend her complaint as to correctly plead the §1985(3) claim. However, upon moving to amend, Petitioner's proposed amended complaint did not contain a claim under §1985(3). Instead, the sole claim in the amended complaint was a claim under Title VII. That the Petitioner did not find this claim of enough merit to re-plead that claim supports the determination of the courts below.

Petitioner's claim under §1985(3) would have been dismissed for lack of merit even if it had been correctly plead. An action will lie under §1985(3) when a plaintiff is injured by a private conspiracy bent in interfering with an individuals constitutional rights, only if there is some racial, or perhaps otherwise class-based, individually discriminatory animus behind the conspirators actions. Bray v. Alexandria Woman's Health Clinic, 506 U.S. 263 (1993); Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc., 968 F.2d 286, 290-91 (2d Cir. 1992), citing Colombrito v. Kelly, 764 F.2d 122, 130 (2d Cir. 1985) (quoting Griffin at 102). This language has been interpreted to require a claim of discrimination between classes such as that based upon racial bias, national origin or religion. Perrotta v Irizarry, 403 F.Supp. 1274 (S.D.N.Y. 1977), aff'd 573 F.2d 1294 (2d Cir.), citing Hahn v Sargent, 523 F.2d 461 (lst Cir. 1975); Arnold v Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974).

The courts below were correct in dismissing Petitioner's claims as they lack merit. In the case at bar, there is no evidence that any conduct by respondents was aimed at, or for the purpose of denying the petitioner her constitutional rights. Bray, 506 U.S. at 275. This Court has held that the mere fact that an alleged

conspiracy has the effect of a constitutional violation is not enough, the very purpose of the conspiracy must be aimed at denying the protected right. Id.

Petitioner has failed to meet the strict requirements of pleading a viable claim under §1985(3). Petitioner's allegations regarding the alleged conspiracy in general, and specifically as to Local 1071's role, were held to be vague and conclusory attempts to add yet another cause of action against Local 1071. (A. 43-44). In her Petition, petitioner again attempts to persuade yet another Court that there is merit to her §1985(3), where none exists. (Pet. 19-24). The petitioner should not be allowed to have yet a third Court examine this issue.

B. The issue that the District Court lacked subject matter jurisdiction as to petitioner's claim under Title VII was also decided correctly by the Courts below.

This issue has also been fully briefed and argued by the parties. (A. 20). At the District Court, Hon. Michael A. Telesca presiding, a hearing was held to specifically determine whether or not Local 1071 was an employer of fifteen or more employees, thus bringing the union under the jurisdiction of Title VII. (A. 21). After said hearing the District Court in a Decision and Order dated October 5, 1995 correctly held that petitioner's claim under Title VII as against Local 1071 was dismissed since Petitioner had failed to establish that Local 1071 was an employer within the meaning of Title VII (42 U.S.C. §2000e(b)). (A. 18-30). On appeal, the Court of Appeals for the Second Circuit upheld the District Court's decision in a Decision and Order dated August 15, 1996. (A. 1-17).

This Court should not grant certiorari in the case at bar because this issue has also been correctly decided by the courts below. Petitioner attempts to argue that Local 1071 is an employer by arguing on several different fronts. First she argues that Local

1071 is an employer because the union has more than 500 members and therefore it meets the requisite of Title VII. (Pet. 25-26). Next, she argues that Local 1071 has the more than 15 employees as required by the statute. (Pet. 26-27). Finally, she argues that Local 1071 is an agent of the parent International Association of Fire Fighters and that because the IAFF has more than 15 employees this should be imputed to the Local. (Pet. 27-29). All of theses arguments were examined by the Courts below and correctly determined to be without merit. (A. 1- 49).

1. The Courts below correctly held that Local 1071's membership was irrelevant to the issue of whether Petitioner could maintain a claim against Local 1071 in its capacity as an employer under Title VII.

The courts below correctly held that Petitioner sued local 1071 in its capacity as an employer, and not in its capacity as a labor union. (A. 31-39). This is axiomatic since the Petitioner is not a member of the union. 42 U.S.C. §2000e-2(c). Therefore, Petitioner is attempting to argue that the term employee as written in the statute is the same as the term member. Petitioner however, is unable to direct the Court's attention to one single case where such a holding was made. Instead, as she argued at the Court of Appeals level, Petitioner would have this Court adopt the EEOC interpretation of Title VII as outlined in its amicus brief in Yeardon v. Henry, 1996 U.S. App. LEXIS 19872 (2d Cir. 1996). No court, including the Second Circuit in that opinion, has ever accepted the EEOC's interpretation and there is no basis for this Court to make such a holding in the case at bar. In fact, in a recent decision, the Fifth Circuit reasoned, as did the Second Circuit in Yeardon and this case, that the EEOC interpretation would negate the impact of the jurisdictional limitations of Title VII which Congress has explicitly set forth. Greenlees v. Eidenmuller Enterprises, 32 F.3d 197 (5th Cir. 1994).

2. The Courts below were correct in holding that Local 1071 did not as a matter of fact, have 15 employees within the meaning of Title VII.

Petitioner next argues that Local 1071 is an employer pursuant to 42 U.S.C. §2000e(b) because Local 1071 employs 15 or more people. (Pet. 26-27). As the District Court for the Western District of New York correctly noted in its decision and Order dated October 5, 1995, "the term employer is defined in Title VII as 'a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.'" (A. 20, citing 42 U.S.C. §2000e(b)). The Second Circuit was also correct in holding that Title VII defines an employee as "an individual employed by an employer." (A. 16, citing 42 U.S.C. §2000e(f)). In determining whether an individual is an employee under Title VII an examination must be performed to determine if the individual performed traditional employee duties. EEOC v. Johnson & Higgins, Inc., No. 95-6216, 1996 WL 446731, at 12 (2d Cir. 1996); Chavero v. Local 241, 787 F.2d 1154 (7th Cir. 1986); EEOC v. First Catholic Slovac Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983).

Again, a hearing was held to specifically determine this issue. (A. 21). The District Court determined after the hearing that there was *at most* five employees of the Local and that this is insufficient as a matter of law to trigger Title VII protections. (B. 36-37). Therefore, the Court below was correct in holding that Petitioner had failed to establish a viable Title VII claim as against Local 1071.

By its very nature, this is a factual determination which has already been determined by two independent courts. According to the Courts below, petitioner has failed to establish that a traditional employee-employer relationship existed between the eight non-

officer board members of the Local 1071 and the Local 1071 itself, and also as between the three individuals which Petitioner argued were also employees and Local 1071. The courts examined in depth, the duties and responsibilities of each individual which petitioner argued was an employee under Title VII. The courts below determined that the officer board members were employees for Title VII purposes, but that the eight non-board members were not employees thereby removing the Local 1071 from the jurisdiction of Title VII. The Courts below also correctly held that the three non-member individuals, Larry Belkin, John Parrinello, and Sam Corridi were also not employees of Local 1071. These were purely factual determinations that were first made by the District Court and then examined again by the Court of Appeals. There is no reason why Petitioner should get a third attempt to argue that Local 1071 has fifteen employees. (A. 1-30).

3. The Courts below were correct in holding that Local 1071 was not the agent of its parent, the IAFF.

Petitioner also attempts to argue that Local 1071 falls within the meaning of employer because Local 1071 is an agent of the IAFF, under a single entity theory. (Pet. 27-29). This argument was also correctly held to be without merit by both of the courts below.

Under Title VII, if an entity employs less than 15 employees, the "single entity theory" may be utilized to bring in another parent or related entity to increase the number of employees to satisfy the 15 employee requirement. 42 U.S.C. §2000e(b); Shepardson v. Local 410, 823 F.Supp. 1245, 1250 (ED Pa. 1993). In order to determine such an issue however, there must be a factual determination as to the level of control and influence which is exercised by the other entity. Ames v. Whitman Chocolates, 1991 WL 281798, 1991 US Dist. (ED. Pa. 1991). This determination is accomplished via a four-pronged test in which the following elements are considered: (1) the inter-relation of operations, (2) common management, (3) centralized control of labor relations,

and (4) common ownership or financial control. Shepardson v. Local 410, 823 F.Supp. at 1250 (citing Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983)).

In Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983), a case similar to the one at bar, the 9th Circuit Court of Appeals, as did the court in this case, dismissed a Title VII action against a local union, Local 18, and its international association, The International Brotherhood of Electrical Workers (IBEW) on the grounds that there was no subject matter jurisdiction due to the number of employees of Local 18 and on the basis that the IBEW was not the plaintiff's employer. In upholding the District Court's dismissal, the 9th Circuit held that subject matter jurisdiction could not be shown by the plaintiff under an agency theory; "Although Local 18 is chartered by the IBEW, it conducts its own labor relations, hires and fires employees on its own, elects its own officers, conducts its own collective bargaining and has a separate treasury." Id. 719 F.2d at 1382.

This issue was again addressed in Shepardson v. Local 410, 823 F.Supp. at 1250. The plaintiff in Shepherdson, like the Petitioner in the case at bar, attempted to cast the local union and its international association as a single entity pursuant to traditional agency principles in an effort to meet the subject matter jurisdictional pre-requisites of Title VII. In attempting to circumvent the holding in Childs, the plaintiff in Shepherdson alleged that the International controlled most, if not all, of the aspects of the local's business. The plaintiff in Shepherdson offered portions of the International Union's Constitution as well as proof that the local union members participated in the International's pension plan. In support of its position the Court considered the evidence, but still dismissed the action holding that the proper analysis should focus " . . . on the reality of control, not necessarily the number and structure of the International's

regulations that govern maintenance of a local charter." Shepherdson, 823 F.Supp. at 1256.

Applying this well settled law to the case at bar, it is clear that the District Court, as affirmed by the Second Circuit, was correct in holding that "the IAFF simply did not involve itself in the day-to-day management of Local 1071" and that "the connections between the two entities were insufficient to demonstrate that Local 1071 is an agent of IAFF." (A. 28). While Local 1071 may be required to follow the rules set forth in the International's Constitution it is free to adopt its own procedures in all other respects, including collective bargaining. Local 1071 shares neither a common treasury, common employees, nor common facilities with the IAFF. Thus, the District Court was correct in holding that the Petitioner failed to meet her burden of demonstrating that Local 1071 and the IAFF are a single entity or that Local 1071 was an agent of the IAFF, and the Second Circuit was similarly correct in upholding that decision. Once again, this was a factual determination that was made by the District Court and affirmed by the Second Circuit Court of Appeals which the Petitioner is asking this Court to examine in the vein hope of getting a favorable decision.

II

This Petition should be denied because Petitioner is not seeking an interpretation of the law, but rather Petitioner is seeking to have this Court make decisions of policy which should be left to Congress.

Petitioner also attempts to argue that the issues presented in this Petition are of exceptional importance and that Petitioner and others like her will have no redress as a result of these decisions. This is simply not true. Petitioner currently has a New York State court action pending under Executive Law §292(5). According to that statute, Petitioner, and others like her, only need to

demonstrate that an employer has five or more employees to bring that employer under the jurisdiction of New York employment law. This gives Petitioner, and others like her, a remedy in the state courts, even though there may be no remedy at the federal level.

Petitioner seeks from this Court the creation of a new policy rather than an interpretation of old policy. Therefore, according to Article I, Section 8(18) of the United States Constitution, the issues presented in this case should be determined by Congress and not by this Court. If petitioner is without remedy in this case it is because the American people, through their duly elected representatives of Congress, have drafted the statute not to include small employers under the protections of Title VII. If Congress has determined that certain individuals are without remedy under Federal Law, it is not the province of this Court to create its own statutory scheme to remedy this situation. This would exceed the limits of the Courts power as established in Marbury v. Madison, 1 Cranch 137 (1803).

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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In The

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CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1499 -- August Term, 1995
Argued: May 16, 1996 Decided Aug 15, 1996)
Docket No. 95-9107

WENDY L. KERN,

Plaintiff-Appellant,

v.

CITY OF ROCHESTER, FIRE DEPARTMENT, of the City of Rochester, POLICE DEPARTMENT, of the City of Rochester, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Defendants-Appellees.

Before: MESKILL and MINER, Circuit Judges, and LASKER, District Judge.*

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, C.J.) denying appellant's motions to amend her complaint to add claims under Title VII of the Civil Rights Act of 1964 and dismissing claims asserted by appellant under U.S.C. § 1983.

Affirmed.

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* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

EMMELYN LOGAN-BALDWIN, Rochester, NY, for Plaintiff-Appellant.

CHARLES D. STEINMAN, Rochester, NY (Linda S. Kingsley, Corporation Counsel, Rochester, NY, of counsel), for Defendants-Appellees City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester, and Charles D. Ippolito.

BRADLEY A. SHERMAN, Culley, Marks, Tanenbaum, Capell and Pezzulo, Rochester, NY, for Defendant-Appellee Rochester Firefighters Association, Inc., Local 1071 IAFF.

ERICK J. GENSER, Washington, DC (Thomas A. Woodley, Mulholland & Hickey, Washington, DC, of counsel), for Defendant-Appellee International Association of Firefighters.

MINER, Circuit Judge:

Plaintiff-appellant Wendy L. Kern appeals from a judgment entered in the United States District Court for the Western District of New York (Telesca, C.J.) denying her motions to amend her complaint and dismissing the complaint for failure to state claims upon which relief can be granted. Kern alleged in the complaint, inter alia, that defendant-appellees City of Rochester (the "City"), the Fire Department of the City of Rochester (the "RFD"), Daniel Cavuoto, and Charles Ippolito (together, the "City Defendants") were liable, pursuant to 42 U.S.C. § 1983, for unconstitutional employment discrimination. In her first proposed amended complaint, Kern repleaded her § 1983 claims against the City Defendants and added a cause of action for employment discrimination against the City Defendants and defendant-appellee Rochester Firefighters Association, Inc., Local 1071 IAFF ("Local 1071") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. In the first of three Decisions and Orders, the district court found that Kern failed to state a claim under § 1983, and that it would be futile to allow Kern to amend her complaint to add a Title VII action because she could not sustain a Title VII action against either the City Defendants or Local 1071. In her second proposed amended complaint, Kern alleged Title VII violations as her sole federal cause of action. In two subsequent Decisions and Orders, the district court again found that it would be futile to allow Kern to add a Title VII action and therefore denied Kern's motion to amend her complaint. On October 5, 1995, judgment was entered dismissing Kern's complaint.

For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

In September of 1992, Kern began her employment as a secretary for Local 1071. Local 1071 is the Rochester branch of the International Association of Firefighters and is the collective

bargaining agent of the firefighters employed by the City. Kern's immediate supervisor was Cavuoto, the president of Local 1071. Cavuoto was a Lieutenant in the RFD,[1] and he also operated a private business known as "Life Safety" with his partner, Lloyd Eldridge. The Life Safety offices were located in the same building as the offices of Local 1071.

In her complaint, Kern alleged that Cavuoto sexually harassed her on numerous occasions between September and December of 1992. The alleged harassment initially consisted of Cavuoto's attempts to engage Kern in conversations of a sexual nature, but culminated in Cavuoto's physical assault of Kern on December 30, 1992. On that day, according to the complaint, Cavuoto and Eldridge invited Kern to "have a holiday drink" with them in the Life Safety offices. After consuming some wine, Kern claims that she began to feel "drunk and out of control." She excused herself and went to the bathroom located in the Local 1071 offices. Shortly thereafter, Cavuoto entered the bathroom and pushed Kern against the bathroom sink. Kern resisted Cavuoto's advances and then lost consciousness. According to Kern, when she regained consciousness, she was partially disrobed and lying on the office floor with Cavuoto standing above her naked below the waist. Kern immediately dressed and left the office. The next day, Kern reported the incident to the Rochester Rape Crisis Center. Following the assault, Kern sought the assistance of the Rochester Police Department (the "RFD") and Local 1071. On January 19, 1992, Kern met with John McMenemy, who was the treasurer of Local 1071 and a lieutenant in the RFD, to discuss the alleged assault. McMenemy prepared a report of Kern's allegations, which was signed by Kern and McMenemy. McMenemy then provided

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[1] Pursuant to a contract between the City and Local 1071, Cavuoto was granted "release time" from his job with the RFD to allow him to perform his duties as president of Local 1071. However, Cavuoto still received full pay and benefits from the City as if he were a full-time employee of the RFD.

the report to the City's Corporation Counsel, the executive board of Local 1071, and Ippolito, who at that time was the Chief of the RFD.

On February 24, 1993, Kern and her attorney met with representatives of the RFD to file a criminal complaint against Cavuoto. Kern was introduced to Detective D'Ambrosio and Investigator Ruvio, who told Kern that they would investigate her allegations. Although the detectives commenced an investigation, the record does not indicate that Cavuoto was charged with any crime.

In March of 1993, McMenemy discussed Kern's allegations against Cavuoto with Ippolito. According to Kern, Ippolito told McMenemy that he was "in big trouble" for reporting Kern's allegations to the executive board of Local 1071, and that, not only was his career in the RFD in jeopardy, but also his union position would be lost if "the members [found] out what [he] did." Two days later, McMenemy was denied promotion to Captain in the RFD.

On June 28, 1993, Kern commenced the action giving rise to this appeal. In her complaint, Kern alleged, inter alia, that the City Defendants were liable under § 1983 for violating her rights to equal protection, due process, and free speech. According to Kern, Cavuoto was liable under § 1983 because he sexually harassed and assaulted her during her employment as his secretary, and therefore deprived her of her right to equal protection. Kern further claimed that the City was liable under § 1983 because it had knowledge of Cavuoto's "womanizing," but failed to take any action to discipline him and therefore deprived Kern of her rights to equal protection and due process. Finally, Kern alleged that the RFD and Ippolito were liable under § 1983 because they retaliated against her for complaining of Cavuoto's sexual harassment by denying McMenemy a promotion to Captain in the RFD, and thus deprived her of her First Amendment right to free

speech.

On August 13, 1993, Kern moved to amend her complaint. In the proposed amended complaint, Kern added a cause of action under Title VII against the City Defendants and Local 1071. Kern also repleaded her § 1983 claims against the City Defendants. Thereafter, the City Defendants and Local 1071 moved, under Fed. R. Civ. P. 12 (b) (6), to dismiss the complaint.

By a Decision and Order dated November 23, 1993, the district court granted the motions of the City Defendants and Local 1071 to dismiss Kern's complaint. The district court found that Kern failed to state a claim under § 1983 against the City or the RFD because she was unable to plead any facts indicating that the deprivation of her civil rights was the result of a policy or custom. The district court also found that Kern failed to state a § 1983 claim against Cavuoto because she failed to show "that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law." Finally, the district court dismissed Kern's retaliation claims, finding that she did not have standing to assert that McMenemy had been deprived of his civil rights on account of her complaint against Cavuoto.

The district court also denied Kern's motion to amend her complaint. The court found that the amendment would be futile because her Title VII claims would fail, since neither the City nor Local 1071 was an employer for purposes of Title VII. However, the district court granted Kern leave to move to file an amended complaint setting forth a valid cause of action under Title VII.

On January 19, 1994, Kern again moved to amend her complaint and also moved for reconsideration of the November 23, 1993 order. Her second proposed amended complaint differed from the original complaint in that she did not allege any violations of § 1983 and her sole federal cause of action was under Title VII. By a Decision and Order dated December 1, 1994, the

district court denied Kern's motion to amend her complaint to add a Title VII cause of action against the City Defendants, but found that a hearing was necessary to determine whether Kern could sustain a Title VII cause of action against Local 1071. The district court also denied Kern's motion for reconsideration of the November 23, 1993 Decision and Order.

On August 14, 1995, an evidentiary hearing was held to determine whether Kern could maintain a Title VII claim against Local 1071. The only issue at the hearing was whether Local 1071 had the requisite number of employees to be considered an employer for purposes of Title VII. By a Decision and Order dated October 5, 1994, the district court found that Local 1071 did not have the requisite number of employees to be considered an employer for purposes of Title VII, and thus concluded that Kern could not make out a Title VII cause of action against Local 1071. Accordingly, a final judgment was entered dismissing Kern's complaint.

This appeal followed.

DISCUSSION

I. Section 1983 Claims

Kern first argues that the district court erred in dismissing her § 1983 claim against the City Defendants. We disagree.

A. Claim against Cavuoto

Kern contends that Cavuoto is liable under § 1983 because he violated her right to equal protection when he sexually harassed and assaulted her while she was employed as his secretary. In order

to state a claim under § 1983,[2] a plaintiff must allege a violation of rights secured by the Constitution or laws of the United States, and that such violation was committed by a person acting under the color of state law. See Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency, 77 F.3d 26, 29-30 (2d Cir. 1996). Because we have held that sex-based discrimination, including sexual harassment, may be actionable under § 1983 as a violation of equal protection, see, e.g., Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994), Kern adequately pleaded a violation of rights secured by the Constitution. The issue in dispute on this appeal is whether Cavuoto was acting under the color of state law when he allegedly deprived Kern of her right to equal protection.

The Supreme Court has stated that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." Id. at 49-50. Mere employment by a state or municipality does not automatically mean that a defendant's actions are taken under the color of state law. See Polk County v. Dodson, 454 U.S. 312, 319-2 (1981).

The district court found that Cavuoto was not acting under the color of state law when he harassed and assaulted Kern. The district

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[2] Section 1983, in part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to be the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

court noted that the complaint makes it clear that, although Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071's president during his contacts with Kern. Kern, nevertheless, argues that Cavuoto was acting under the color of state law because the sexual harassment and assault occurred while Cavuoto was receiving full-time pay and benefits from the City. Kern also claims that the fact that the harassment and assault occurred at Local 1071's offices, where Cavuoto regularly conducted business with city employees, demonstrates that he was acting under the color of state law.

We think that Kern fails to demonstrate that Cavuoto "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting Classic, 313 U.S. at 326). First, Cavuoto did not hold his position as president of Local 1071 by virtue of any action by the City. Cavuoto was .elected president by union members, irrespective of his position in the RFD. Furthermore, in his capacity as Local 1071's president, Cavuoto performed functions solely for the benefit of the union, not for the benefit of the City. Finally, while Cavuoto may have met with City officials in Local 1071's offices, this does not alter the fact that he did so in his capacity as president of Local 1071 and not as an employee of the RFD. Accordingly, we think that the district court properly dismissed Kern's § 1983 claims against Cavuoto.

B. Claim against the City

Kern claims that the City is liable under § 1983 because it knew of Cavuoto's "womanizing" and failed to stop it. Under Kern's theory, the City's duty to prevent Cavuoto's alleged womanizing arose from its supervisory relationship with Cavuoto. Kern claims that this relationship existed because the City paid Cavuoto a full salary and provided him with benefits while he was president of Local 1071. Even assuming that Cavuoto could be

considered to have been under the City's supervision while he was the president of Local 1071, we think that the district court properly dismissed her § 1983 claim against the City.

We have held that, "[i]n order to establish the liability of a municipality in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996). Furthermore, "'circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction,'" can support a finding that such a policy exists. Id. (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). The policy or custom need not be memorialized in a specific rule or regulation. Sorlucco v New York City Police Dep't, 971 F.2d 864, 870 (2d Cir. 1992). However, when discriminatory practices of city officials become "persistent and widespread," they may be considered to constitute a municipal custom or usage. Id. at 870-71.

Kern argues that the fact that the City knew of Cavuoto's harassment yet failed to take any affirmative action to prevent Cavuoto from committing further harassment demonstrates a policy of support for the harassment. We think that Kern fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy. There is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever complained about Cavuoto to the City or to Cavuoto's superiors at the RFD. Moreover, while Kern claims that it was well-known around the Firehouse that Cavuoto was a "pig" who had stated that he hires secretaries "with fast hands and slow lips," these

assertions are wholly conclusory and are not sufficient to defeat a Fed. R. Civ. P. 12 (b) (6) motion to dismiss. See Butler v. Castro, 896 F.2d 698, 700 (2d Cir. 1990) ("A conclusory allegation . . . without evidentiary support or allegations of particularized incidents, does not state a valid claim."). Accordingly, Kern's § 1983 claims against the City properly were dismissed.

C. Claim against RFD and Ippolito

Finally, Kern claims that the RFD and Ippolito are liable under § 1983 for retaliating against McMenemy by denying him a promotion to Captain in the RFD after he reported Cavuoto's harassment and assault to the executive board of Local 1071 and the RFD. We think that the district court properly found that Kern lacks standing to raise a § 1983 claim on the basis of retaliation against McMenemy.

In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court stated that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499. In the present case, Kern does not argue that she personally was retaliated against by the RFD or Ippolito. Instead, she attempts to rest her retaliation claim on an alleged violation of McMenemy's civil rights. Because this is precisely what Warth forbids, Kern's retaliation claim properly was dismissed.

II. Title VII claims

Kern argues that the district court erred by failing to allow her to amend her complaint to add Title VII claims against the City and Local 1071. we disagree.

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's . . . sex." 42 U.S.C. § 2000e-2 (a). The term "employer" is defined in Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U. S.C. § 2000e (b). "Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Tadros v. Coleman, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), aff'd, 898 F.2d-10 (2d Cir.), cert. denied, 498 U.S. 869 (1990).

A. Claim against the City

In denying Kern's motion to amend her complaint to add a Title VII cause of action against the City, the district court found that the City was not Kern's employer under Title VII and that "there was no direct connection between the [City's] actions and the claimed harm to [Kern]." While Kern concedes that she was not directly employed by the City, she claims that her job would not exist but for the employment of the firefighters for whom she works and the employment contract between the RFD employees and the City. Kern argues that, because of this connection, the City should be considered her employer for purposes of Title VII.

In support of her argument, Kern points to Spirt v. Teachers Insurance & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983). In Spirt, the plaintiff, a female professor at Long Island University ("LIU"), brought a Title VII action against two annuity fund management companies with which LIU had contracted to manage the retirement program for its employees. The plaintiff claimed that the companies violated Title VII by using sex-based mortality tables to calculate the benefits for plan participants. In determining that the companies were liable under Title VII, we stated that "the term "employe" as it is used in Title VII, is sufficiently broad to

encompass any party who significantly affects access of any individual to employment opportunities." Id. at 1063 (quotation marks omitted). We went on to hold that, although the companies did not directly employ the plaintiff, the companies could be considered her "employer" under Title VII because the companies were "closely intertwined" with LIU in light of the fact that LIU delegated to the companies its responsibility to provide retirement benefits. Id. We also noted that the finding of an employment relationship between the companies and the plaintiff was supported by the facts that the plaintiff's participation in the retirement program was mandatory and that LIU shared in the administrative responsibilities of the retirement program. Id.

Spirt, however, is distinguishable from the present case. First, Local 1071, unlike LIU in Spirt, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071 — and therefore her job — would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer. Therefore, the district court properly denied Kern's motions to amend her complaint to add a Title VII action against the City.

B. Claim against Local 1071

In denying Kern's motion to amend her complaint to add a Title VII cause of action against Local 1071, the district court held that, in order for Local 1071 to be deemed an "employer" within the meaning of Title VII and thus be amenable to a Title VII cause

of action, it must have at least 15 employees. The district court, following an evidentiary hearing, determined that "Local 1071 had only five employees during all times relevant to the complaint." Therefore, the district court determined that it would be futile to allow Kern to amend her complaint to add a Title VII cause of action against Local 1071.

Kern claims that the district court erred in two regards. First, Kern claims that the district court erred in holding that she must prove that Local 1071 employed at least 15 employees during the alleged discrimination in order for her to maintain a Title VII action against Local 1071. According to Kern, because Local 1071 is a labor organization, there is no minimum number of employees requirement to maintain an action under Title VII. In the alternative, Kern claims that the district court erred in determining that Local 1071 employed fewer than 15 employees during the alleged discrimination.

In support of her argument that she need not demonstrate that Local 1071 had 15 employees in order to maintain her Title VII cause of action, Kern points to the EEOC Compliance Manual, Volume II, § 605, Appendix N. The manual explains that both labor organizations and employment agencies with fewer than 15 employees may be covered by Title VII if they regularly deal with employers covered by Title VII. According to Kern, because Local 1071 regularly deals with the City, an employer covered by Title VII, she need not demonstrate that Local 1071 has 15 employees. We know of no federal court that has adopted this interpretation of Title VII. To the contrary, it consistently has been held that, when a plaintiff brings a Title VII action against a union in its capacity as an employer, the plaintiff must demonstrate that the union meets the Title VII definition of "employer." On the other hand, if a plaintiff brings a Title VII action against a union in its capacity as a labor organization, the plaintiff must demonstrate that the union

meets that statutory definition of a "labor organization."[3] See Yerdon v. Henry, No. 95-7604, 1996 WL 438933, at *6 (2d Cir. Aug. 6, 1996) (holding "a labor organization with fewer than fifteen employees cannot be sued as an employer for discrimination under Title VII of the 1964 Civil Rights Act"); Chavero v. Local 241, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986) (holding that "[u]nder Title VII a union can be both an 'employer' and a 'labor organization,'" and noting that "[w]here . . . a plaintiff attempts to hold the union liable in its employer capacity, [the union] must fall under that definition, just as any other employer." (citation omitted)); cf. Herman v. United Bhd. of Carpenters & Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (holding that, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., which contains definitions of "employer" and "labor organization" that are virtually identical to those in Title VII, a plaintiff who sues a union in its capacity as an employer must demonstrate that the union meets the statutory definition of employer); Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-99 (5th Cir. 1994) (stating that an employment agency can be classified as either an employer or an employment agency, but, when it is sued in its capacity as an employer, plaintiff must demonstrate that it meets the Title VII definition of employer). In the present case, because Kern is suing Local 1071 in its capacity as her employer, not in its capacity as a labor organization, the district court properly determined that Kern must demonstrate that Local 1071 meets the Title VII definition of an employer. This definition requires that Local 1071 have at least

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[3] 42 U.S.C. § 2000e(d) states, in part:

The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms of conditions of employment . . . .

15 employees. See 42 U.S.C. § 2000e(b). Accordingly, we now turn to the issue of whether the district court erred in determining that Kern failed to demonstrate that Local 1071 had 15 employees.

The district court found that Kern and Local 1071's four officers—the president, the vice president, the secretary, and the treasurer—were the only employees of Local 1071. The district court explicitly rejected Kern's claim that the eight non-officer members of Local 1071's executive board, along with the sergeant-at-arms and three other persons who provided services to Local 1071, were employees for purposes of Title VII. Because Kern's claim necessarily rests on whether the district court erred in determining that the eight non-officer board members were not employees, we only address this issue.

Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e (f). Courts have held that directors or board members, while traditionally viewed as employers, can be considered employees depending upon their responsibilities within the business. See, e.g., EEOC v. Johnson & Higgins, Inc., No. 95-6216, 1996 WL 446731, at *12 (2d Cir. Aug. 8, 1996) (holding that directors of an insurance brokerage firm were employees for purposes of the ADEA because each performed traditional employee duties, worked full-time for the firm, and reported to senior members of the firm). In Chavero, the Seventh Circuit stated that, "[a]lthough a director may accept duties that make him also an employee, a director is not an employee because he draws a salary. Rather, the primary consideration is whether an employer-employee relationship exists." 787 F.2d at 1157 (citations omitted). In EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983), the Sixth Circuit held that persons who were directors and officers could be considered employees under the ADEA because the individuals "performed traditional employee duties" such as "maintaining records, preparing

financial statements, [and] managing the office." Id. at 1070.

In the present case, Kern fails to demonstrate that a traditional employee-employer relationship existed between the eight non-officer board members and Local 1071. The function of the eight non-officer board members was to represent their various constituencies on a board that made and directed the policy of Local 1071 and exercised general oversight over Local 1071's officers. There is no indication that any of the non-officer board members performed any traditional employee duties, such as maintaining records or managing the office. Moreover, there is no indication that the non-officer board members were responsible to anyone but themselves. Thus, the district court properly found that the non-officer members of Local 1071's executive board were not employees for purposes of Title VII. Without these eight members being considered employees, Kern is unable to demonstrate that Local 1071 had 15 employees. Accordingly, the district court correctly found that it would be futile to allow Kern to amend her complaint to add a Title VII action against Local 1071.

CONCLUSION

We have considered Kern's other contentions, and we find them all to be without merit. In view of the foregoing, we affirm the judgment of the district court.

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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff Wendy Kern filed a complaint against the above-named defendants, alleging that they were liable under 42 United States Code §§ 1983 and 1985 and various state law causes of action as a result of an alleged attack upon the plaintiff by defendant Cavuoto in December of 1992. She then filed a proposed amended complaint, adding a claim for employment discrimination in violation of Title VII. In a decision dated November 23, 1993, I dismissed the original complaint for failure to state a federal claim and her proposed amended complaint for

failure to properly allege a cause of action under Title VII, but allowed the plaintiff leave to move to file an amended complaint to set forth a valid cause of action under Title VII and/or § 1985 (3). Plaintiff then moved for reconsideration of this decision and for leave to file an amended complaint. In a decision and order, I denied her motion to file an amended complaint, her motion for reconsideration and ordered that a hearing be held on the jurisdictional question of whether Local 1071 is an employer which employed at least 15 persons as provided in 42 U.S.C. § 2000e(b).

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she allege committed various acts of sexual harassment and discrimination against her during the course of her employment by the union. After the original complaint was filed, all defendants moved to dismiss the action. In a Decision and Order dated November 23, 1993, I dismissed the complaint for failure to state a claim and denied plaintiff leave to file her proposed amended complaint in the action because it was deficient. I granted leave, however, to allow the plaintiff to file an additional proposed amended complaint to remedy the deficiencies in the complaint. Plaintiff's proposed amended complaint differed from the original complaint principally in that it alleged a violation of Title VII as the sole federal cause of action and does not allege violations of either 42 U.S.C. § 1983 or 42 U.S.C. § 1985. Plaintiff moved to submit this proposed complaint as her amended complaint. I held, relying on Greenlees v. Eidenmuller Enterprises, Inc., 32 F.3d 197 (5th Cir. 1994) and Shepherdson v. Local Union No. 401, 823 F.Supp. 1245, 1249 (E.D.Pa. 1993), that because plaintiff was suing Local 1071 in its capacity as an employer it would have to meet the statutory definition of employer set forth in Title VII.

Both the plaintiff and the defendant Local 1071 submitted detailed proffers of evidence, affidavits, documentary exhibits, and memoranda of law concerning the issue.

DISCUSSION

1. Plaintiff's Title VII Claims

In my previous decision, I held that the plaintiff's attempts to state a cause of action under Title VII was deficient because she had not alleged that her employer (Rochester Firefighters Association Inc., Local 1071, International Association of Fire Fighters), employed more than fifteen persons, which is a statutory prerequisite to bringing an action under Title VII. Both sides submitted oral proffers of evidence and numerous documentary exhibits at a hearing on the jurisdictional issue on August 28, 1995.

The plaintiff is charged with the burden of proving the Court's jurisdiction. Shepherdson v. Local 401, 823 F.Supp. 1245 (E.D. Pa. 1993). As I discussed in my previous decision, because the plaintiff is suing Local 1071 in its capacity as an employer, she must demonstrate that Local 1071 is an employer within the meaning of Title VII. Pursuant to 42 U.S.C. § 2000e-(b), an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." The "current year" in the statute refers to the year in which the alleged discrimination occurred. Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980). The twenty week statutory minimum is satisfied by either employment for twenty consecutive weeks or any twenty weeks within a calendar year. See Shepherdson, 823 F. Supp. at 1252. Finally, both part-time and full-time employees count toward meeting the jurisdictional minimum. See, e.g., Thurber v. Jack Reilly's, Inc., 717 F.2d 633 (lst Cir. 1983), cert.

denied, 466 U.S. 904 (1984).

Prior to the hearing, both sides stipulated that Wendy Kern was an employee within the meaning of the Act. This is clearly supported by the evidence submitted, and I accept this as fact. The parties disagree, however, concerning the other persons that the plaintiff claims are employees of the union. These persons break down into three main groups:

1) Union Officers — the President, Vice-President, Secretary, and Treasurer of Local 1071;

2) Other Executive Board Members — Eight elected officers of the executive board representing various constituencies of the membership, plus the Sergeant-at-Arms (who is elected but is not, technically, an officer of the Executive Board);

3) Persons Providing Other Services to the Union – Three persons who have provided services to the Union in non-elected capacities.

Plaintiff claims that all members of each of the three groups should be counted as employees. She thus claims that the total number of Local 1071 employees is seventeen. I address each group in turn:

a. Union Officers

Local 1071 elects one person to each position of President, Vice-President, Secretary, and Treasurer. The President differs from all other elected union positions in that he is on full release time from employment as a fire fighter. In other words, although the union president is paid his full salary by the Rochester Fire Department, he is not required to assume the regular task of fighting fires. Instead, his full time job is union business. He is still paid his full city salary, and receives an additional $7,500.00 per year from the Union. The Vice-President, Secretary, and Treasurer

of the Union do not have the benefit of release time, and thus must maintain their regular full-time schedule as firefighters. However, they receive $5,700 per year in compensation from Local 1071 for services to the Union. The amounts of compensation are established in Article V, Section 4 of Local 1071's By-Laws and are termed "salaries" by the Union.

The plaintiff claims that the four union officers are employees of Local 1071, contending that their work is "traditional employee work" and citing the Sixth Circuit's decision in EEOC v. First Catholic Slovak Ladies Association, 694 F.2d 1068, 1070 (6th Cir. 1982) for this principle. Slovak Ladies Association teaches that the label which an organization assigns to a particular position or whether that position is chosen by an election does not determine whether that person is an employee within the meaning of Title VII. The relevant determination is whether the duties performed by the officers are primarily "employee" or "employer" tasks. Plaintiff contends that the four Union officers are employees because they perform traditional employee duties.

The defendants contend that they are not employees within the meaning of Title VII, relying principally on Chavero v. Local 241, 787 F.2d 1154 (7th Cir. 1986). In Chavero, the Seventh Circuit held, in a decision analogous to this case, that the officials of the union local could not be considered employees because the Board "reports to no one other than itself" and that a finding that the Board members were employees would distort "traditional concepts of employment relationships." Chavero, 787 F.2d at 1157.

While it is true that the union officers are elected, a factor which favors a finding that they are not employees, there are significant indications that the four union officers are employees. First, each of the four union officers received bi-weekly payments from the union, from which were deducted payroll taxes and Social Security and Medicare payments. Similarly, the union submitted

yearly reports of the salaries paid and the taxes withheld on a standard IRS W-2 form.

The defendants' attorney contends that the union withheld taxes in this manner because the union's accountant could only classify the union officials as "employees" or "independent contractors" for tax purposes. Because the four officials did not fit the definition of independent contractors, the accountant was required to classify them as employees for tax purposes. While the accountant's determination is not conclusive on this issue, it does indicate that the four union officers were considered employees. More significant to the analysis is the By-Laws of Local 1071, which specify duties to be performed by each of the four officers. According to Article I, Section 1, for example, the Union President is required to represent Local 1071 as a delegate to the International and State IAFF conventions as well as to the Rochester and Vicinity Labor Council, countersign all checks drawn by the treasurer, control the printing of all organizational literature and "to perform all other duties as this Union may direct from time to time." The Vice-President, pursuant to Article I, Section 2, is required to be Chairman of the Executive Board and a delegate to the Rochester and Vicinity Labor Council. The Treasurer, pursuant to Article I, Section 3, is required to essentially manage all the funds of the Union, maintain receipts, and issue quarterly reports. Finally, the Secretary, pursuant to Article I, Section 4, is required to "keep an accurate record of the proceedings of all meetings, read all communications, and conduct all correspondence."

In examining the various types of duties performed by the four Local 1071 officers, combined with the amount of their salary, and the fact that each is treated as an employee for tax purposes by the Union, I agree with the plaintiff that the four executive officers of the Union are employees within the meaning of the statute. The tasks performed by these four persons go

beyond the general supervisory tasks normally expected of directors and in fact conduct the day-to-day business.of the Union. The plaintiff has also demonstrated that the four officers were responsible to conduct business frequently enough to constitute twenty working weeks within the year prior to the alleged discrimination in this case. For example, the Union provides cellular phones for the persons designated as President, Vice-President, Secretary, and Treasurer and has published those numbers to the membership for use when "it is imperative to reach a paid member of the Executive Board." See Exhibit 13. I therefore find that the President, Vice-President, Secretary, and Treasurer of Local 1071 are "employees" within the meaning of Title VII and should be counted in determining the 15 employee minimum required by 42 U.S.C. § 2000e-(b)

b. Non-Officer Board Members

In contrast to the four officers, the eight other board members and the Sergeant-at-Arms have significantly different job descriptions with respect to compensation, duties, and time required. According to the By-Laws, each of the non-officer board members represent various constituencies of the Union and vote at board meetings. In return for their service to the Local, they receive approximately $150 per year, paid quarterly, according to Article V, Section 4B of the Local By-Laws of Local 1071. Furthermore, the Battalion Chief, Captain, and Lieutenant Board Members have no additional set responsibilities, while the additional duties of the five trustees are to attend meetings, audit the books of the Treasurer, conduct the elections, and submit a report to the International. The duties of the Sergeant-at-Arms are limited essentially to maintaining order and recording meeting attendance.

Although the plaintiff contends that the non-officer members of the Local 1071 board are all employees of Local 1071, the type of work they performed and the range of their responsibilities

strongly indicate that they are not employees. In contrast to the four union officers, the non-officer board members do not conduct the day-to-day activities of Local 1071, but rather make and direct policy at the meetings and exercise general oversight over the four union officers. While the President, Vice-President, Secretary, and Treasurer are expected to be on call to answer questions and conduct union business on a regular basis (and on infrequent occasions a non-officer board member has performed work on behalf of the Union,) there is no indication that similar duties are regularly required of the non-officer members of the board so as to make them employees for Title VII purposes.

The Seventh Circuit's decision in Chavero and the Sixth Circuit's decision in Slovak Ladies Association both support this conclusion. In Chavero, the court held that "[a]though a director may accept duties that make him also an employee . . . , a director is not an employee because he draws a salary." Chavero, 787 F.2d at 1157 (citing Slovak Ladies Association, 694 F.2d at 1070). Slovak Ladies Association also expresses this principle, although the court concluded that the directors were employees under the particular facts of the case. In that case, the directors were held to be employees because they were also salaried officers who maintained financial records and managed the union office. In this case, I have already found that those board members who are also salaried officers are employees for Title VII purposes. I find, however, that the eight other board members and the Sergeant-at-Arms are not employees for Title VII purposes because they are no more than minimally-paid directors of the Union with very limited responsibilities. They simply do not fit the traditional definition of employee.

c. Other Alleged Employees

Kern also alleges that Larry Belkin, John Parrinello, and Sam Corridi are employees of the Union. Larry Belkin had been contracted as a fund-raiser for the Union. John Parrinello was

retained counsel for the Union for approximately fifteen years. Sam Corridi is a retired firefighter paid by the Union to videotape retirement parties.

Kern simply has not demonstrated that any of these three persons are employees. In fact, several exhibits submitted by the plaintiff herself contradict any conclusion that Larry Belkin is an employee. Plaintiff's Exhibit 24, for example, includes a contract between Daniel Cavuoto and Larry Belkin entered into on January 6, 1992. This contract sets forth an agreement by which Belkin's company, Fundraising Services of New York, Inc., would publish a fire prevention booklet in which ad space would be sold. The booklets would then be sold through phone solicitation by Fundraising Services and the gross receipts would be split, with 25% to Local 1071 and 75% to Fundraising Services, Inc. In addition, Fundraising Services guaranteed Local 1071 at least a $200,000 profit over the five year period of the agreement. Finally, Fundraising Services, Inc. maintained its own offices and hired its own personnel to sell ad space and solicit orders for the booklet.

The contract between Local 1071 and Larry Belkin is simply not an employment contract. It is a contract between the union and an independent contractor for fundraising services. Fundraising Services, Inc. guaranteed Local 1071 a profit from the contract, which plainly contradicts the essence of an employment contract, by which an employer offers pay in return for personal services. There is absolutely no indication that Larry Belkin served the Union in any capacity even remotely resembling an employment relationship. In short, plaintiff's contention that Larry Belkin was an employee of Local 1071 is plainly contradicted by the terms of the agreement between the parties.

Similarly, plaintiff's contention that John Parrinello was an employee of the union is completely unsupported by the facts. John Parrinello has appeared before this Court on many occasions, maintains his own office in partnership with another attorney, and

appears from the Union records to have been paid by the Union on an hourly basis. Plaintiff's contention that Redmond & Parrinello had their own line in the Union budget and that former union president Daniel Cavuoto spoke frequently with John Parrinello on the phone simply does not support her conclusion that John Parrinello is therefore an employee of the Union. Such facts are equally consistent with Parrinello being an independent attorney contracting with Local 1071 to provide legal services. I find that plaintiff has not demonstrated that John Parrinello was an employee of Local 1071.

Finally, plaintiff contends that Michael Corridi was an employee of the Union. Corridi is apparently a retired fire-fighter who tapes various retirement parties and other Union events, for which he is reimbursed for the cost of video tape and for the use of his equipment. As with Parrinello and Belkin, however, the plaintiff has not demonstrated the necessary control over Corridi which is the earmark of an employment relationship. Based upon my review of the evidence, I conclude that Corridi is an independent contractor who could accept or reject a taping job as he chose. Similarly, if there were no retirement parties to be taped, Local 1071 had no obligation to pay Corridi on a regular business. Further, it appears that Corridi provided his own equipment and charged a standard amount (approximately $50) for each event. In this case, the facts clearly demonstrate that Corridi is not an employee but an independent contractor. Thus, I find that plaintiff has failed to demonstrate that Corridi was an employee of the Union.

2. Single Entity Theory

Plaintiff also claims that Local 1071 meets the 15 employee test because the employees of the parent union, the International Association of Fire Fighters (IAFF) should be counted under a "single entity theory." Defendant Local 1071 does not contest that if employees of the IAFF were counted, the statutory

requirement of fifteen employees would be met. Local 1071 argues, however, that application of the single entity theory in this case is inappropriate because the required control by the IAFF over Local 1071 does not exist.

In order for the single entity theory to apply to Local 1071, more than a connection or relationship between the two entities must be demonstrated. Instead, Kern must demonstrate that the Local was an agent controlled by the IAFF[1] or a single entity with the IAFF. Several circuits have adopted a four-part analysis to determine whether two distinct entities constitute a single employing entity. This test considers "1) inter-relation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership or financial control." Shepherdson v. Local 401,, 823 F.Supp. at 1250 (citing Childs v. Local 18. International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983)).

Examining plaintiff's proof in light of this test, I find that the connections between Local 1071 and the IAFF do not establish an agency relationship. It is undisputed that Local 1071 is subordinate to the IAFF pursuant to the charter and constitution of the IAFF. Nevertheless, I find that the connections between the two entities were insufficient to demonstrate that Local 1071 is an agent of the IAFF.

Kern alleges facts which she claims support this conclusion. For example, on Page 14 of the plaintiff's reply memorandum of law (Docket Item Number 80), she claims that Local 1071 should be considered an instrumentality of the IAFF because the

[1] If Kern were able to demonstrate that Local 1071 were an agent of the IAFF, however, the Title VII claim could only proceed against the IAFF, and not Local 1071. The Second Circuit has recently held that Title VII does not permit liability for agents of employers. See Tomka v. The Seiler Corporation, Dkt. No. 94-7975 (2d Cir., September 27, 1995). Nevertheless, in light of my determination that Local 1071 is not an agent of the IAFF, neither party is subject to Title VII liability.

International failed to act to censure Lt. Cavuoto when Kern made her allegations. Oddly, Kern is attempting to allege control and domination of the Local because the IAFF did not step in and attempt to micro-manage the handling of Kern's claim. The facts which Kern alleges, however, appear to lead to the opposite conclusion: that the IAFF simply did not involve itself in the day-to-day management of Local 1071.

Kern also contends that Local 1071 is dominated based upon IAFF's alleged actions in impounding union election results in 1994 and financial records in 1994 and 1995. Even setting aside the issue of whether the IAFF's actions in 1994 and 1995 could establish domination and control of Local 1071 in 1992, the actions taken by the International with respect to both the elections and financial records appear to be within the International's constitutional power based upon Article XIII, Sections 9 (Audits and Financial Reports), 11 (Nomination and Elections of Officers), and 22 (Assistance of International on Disputes and Grievances).

More importantly, however, the plaintiff has failed to demonstrate any consistent domination of Local 1071 by the IAFF. Kern has not demonstrated an inter-relation of operations to any significant degree. According to the IAFF's constitution, Local 1071 exists as an autonomous entity under the IAFF Constitution affiliated with and chartered by the IAFF. While Local 1071 is required to follow rules set forth in the International's Constitution and By-Laws, it is free to adopt its own procedures in all other respects. Furthermore, plaintiff has failed to demonstrate any control by the International over Local 1071's funds, any common management personnel shared between the International, nor any control over the Local's collective bargaining. Consequently, I conclude that the plaintiff has not met her burden of demonstrating that Local 1071 and the IAFF are a single entity or that Local 1071 is an agent of the IAFF. See Childs v. Local 18, IBEW, 719 F.2d 1379 (9th Cir. 1983).

CONCLUSION

In light of my findings that Local 1071 had only five employees during all times relevant to the complaint and that Local 1071 is neither an agent of nor a single entity with the International Association of Fire Fighters, I hold that Local 1071 is not an employer within the meaning of Title VII (42 U.S.C. § 2000e(b). Consequently, I dismiss the Title VII action against Local 1071 and Daniel Cavuoto.[2] As plaintiffs remaining claims are pendent state-law claims which are currently being pursued in New York State Supreme Court, I exercise my discretion to dismiss them without prejudice. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1367(c)(3). Plaintiff's complaint is dismissed in its entirety.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
October 5, 1995

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[2] The Title VII claim against Cavuoto would be dismissed in any event due to the Second Circuit's holding that agents of employers cannot be held personally liable for violations of Title VII. Tomka v. The Seiler Corporation, Dkt. No. 94-7975 (2d Cir., September 27, 1995).

FILED
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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff Wendy Kern filed a complaint against the above-named defendants, alleging that they were liable under 42 United States Code §§ 1983 and 1985 and various state law causes of action as a result of an alleged attack upon the plaintiff by defendant Cavuoto in December of 1992. She then filed a proposed amended complaint, adding a claim for employment discrimination in violation of Title VII. In a decision dated November 23, 1993, I dismissed the original complaint for failure to state a federal claim and her proposed amended complaint for

failure to properly allege a cause of action under Title VII, but allowed the plaintiff leave to move to file an amended complaint to set forth a valid cause of action under Title VII and/or § 1985 (3). Plaintiff has since moved for reconsideration of this decision and for leave to file an amended complaint in this action. She has also moved to supplement the record. For the reasons stated below, I deny her motion to file an amended complaint, her motion for reconsideration, and her motion to supplement the record. A hearing will be held on the question of whether Local 1071 is an employer which employed at least 15 persons as provided in 42 U.S.C. § 2000e(b).

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she alleged committed various acts of sexual harassment and discrimination against her during the course of her employment by the union. She also alleged that Rochester Fire Department Lt. John McMenemy (the Treasurer of Local 1071) was denied a promotion to Captain because he processed Ms. Kern's internal union complaint. She alleged that members of the Rochester Police Department investigating her criminal charges were friends of Mr. Cavuoto and that information concerning these charges was given to him before first informing Ms. Kern, as she had been promised. Finally, she alleged that she was terminated from employment in retaliation for her making complaints and filing this lawsuit.

After the original complaint was filed, all defendants moved to dismiss the action. In a Decision and Order dated November 23, 1993, I dismissed the complaint for failure to state a claim and denied plaintiff leave to file her proposed amended complaint in the action because it was deficient. I granted leave, however, to allow the plaintiff to file an additional proposed amended complaint to remedy the deficiencies in the complaint.

Plaintiff's current proposed amended complaint differs from the original complaint principally in that it alleges a violation of Title VII as the sole federal cause of action and does not allege violations of either 42 U.S.C. § 1983 or 42 U.S.C. § 1985. Plaintiff now moves to submit this proposed complaint as her amended complaint and for reconsideration of this Court's November 23, 1993 decision in light of the Second Circuit's decision in Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2d Cir. 1982), claiming that this authority was overlooked by both this Court and counsel.

DISCUSSION

1. Plaintiff's Title VII Claims

In my previous decision, I held that the plaintiff's attempts to state a cause of action under Title VII was improper because she had not alleged that her employer (Rochester Firefighters Association Inc., Local 1071, International Association of Fire Fighters), employed more than fifteen persons, which is a statutory prerequisite to bringing an action under Title VII.

Kern argues that she is not required to allege that Local 1071 employed more than 15 persons because it is a union, and is not subject to this employment requirement. In support of her argument, she has submitted several EEOC decisions which take the position that there is jurisdiction as an employer over any labor organization under Title VII, whether or not that labor organization employs more than 15 persons. She argues that the position of the EEOC on this matter should be given great weight and that the court should not substitute its judgment for that of the agency so long as the view of the EEOC is rational. She cites Chemical Manufacturers Ass'n v. National Resource Defense Counsel, 470 U.S. 116, 125 (1985) in support of this position.

The United States Court of Appeals for the Fifth Circuit addressed a closely analogous issue in its recent decision in

Greenlees v. Eidenmuller Enterprises, Inc., 32 F.3d 197 (5th Cir. 1994). Plaintiff was employed by defendant, which operated as an employment agency. She brought suit under Title VII, alleging discrimination as the basis for her termination. The District Court dismissed her complaint for lack of jurisdiction. The Fifth Circuit affirmed, holding that when an employment agency is sued in its capacity as an employer, the plaintiff must demonstrate that the agency meets the statutory definition of "employer", which included the requirement that it employed more than 15 persons. The Court relied on several decisions in union-employer cases to support its conclusion. Id. at 199 (citing cases).

Significantly, the plaintiff in Greenlees raised an argument almost identical to that advanced here by Kern: that the District Court erred in refusing to defer to the EEOC's interpretation of its guidelines, which provide that employment agencies are covered by Title VII as employers even when they do not have a sufficient number of employees to meet the statutory definition. The Court rejected this argument on two grounds. First, the Court held that the statute was not ambiguous and thus did not warrant deference to agency interpretation. Second, it held that the usual deference given to agency interpretations is limited when applied to the EEOC because Congress did not give EEOC the authority to promulgate rules or regulations under Title VII. The Court thus refused to defer to EEOC interpretation because the plain language of the statute and the weight of precedent contradicted the EEOC's position.

The rationale of Greenlees is squarely applicable to this case. Kern is suing Local 1071 in its capacity as an employer, not in its capacity as a union. Therefore, Kern must demonstrate that Local 1071 meets the statutory definition of "employer".

Kern does not allege in her proposed amended complaint that Local 1071 employs more than 15 persons. She merely alleges generally that Local 1071 is "an employer within the meaning of

the laws against discrimination/retaliation". Ms. Kern alleges in an affidavit accompanying her proposed amended complaint, however, that Local 1071 had more than 15 employees at the time of the alleged discrimination and listed them. This list includes the President, Vice-President, Secretary, and Treasurer of Local 1071, nine other members of Local 1071's executive board, Kern, a retired firefighter who occasionally taped retirement parties (Sam Corridi), a person who acted as a fund raiser for Local 1071 (Larry Belkin), and Local 1071's attorney (John Parrinello), for a total of seventeen.

These general allegations are specifically contradicted by an affidavit submitted by Richard Mattice, Secretary of Local 1071. In that affidavit, he contends that only Daniel Cavuoto and Kern were employees within the meaning of 42 U.S.C. § 2000e(b) and that the others listed were part-time officers of the union, members of the executive board of the union, or independent contractors. He alleges that none of the persons listed met the statutory standard of being "employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Therefore a hearing is required to resolve the questions of fact presented as to whether or not these persons are employees of Local 1071 within the meaning of the statute. Contrary to plaintiff's counsel's suggestion, this is not a jury question. See Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977) (District Court has power to weigh evidence and resolve questions of fact concerning basis of subject matter jurisdiction, and no presumptive truthfulness attaches to plaintiff's allegations.); Shepherdson v. Local Union No. 401, 823 F.Supp. 1245, 1249 (E.D.Pa. 1993) (District Court has power to resolve issue of whether employer has fifteen members).

Whether this Court has subject matter jurisdiction over the pendant state law causes of action will depend on the determination of this issue. United Mine Workers v. Gibbs, 383 U.S. 715 (1966);

28 U.S.C. § 1367(c)(3).[1] Plaintiff's Motion for Reconsideration Plaintiff has also moved for reconsideration of my prior decision based upon the Second Circuit's decision in Spirt v. Teachers Ins. and Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), which she claims was overlooked by both this Court and counsel. The decision is, however, inapplicable to this case. In Spirt, a tenured professor at Long Island University ("LIU") sued two annuity funds that LIU had contracted to manage the retirement program for its employees. She claimed that they violated Title VII by using sex-based mortality tables to calculate the benefits for each of the plan participants. The District Court agreed and granted summary judgment. The Second Circuit, among other issues in the case, considered whether the funds could be considered "employers" within the meaning of Title VII. The Court held that the funds should be considered employers, even though they did not directly employ the plaintiff because the funds, "which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, . . . that they must be deemed an employer for purposes of Title VII." Id. at 1063.

The facts in Spirt differ significantly from this case. Most importantly, Spirt involved actions by the defendants which directly affected the plaintiff. In the present case, Kern has advanced the theory that the City of Rochester should be accountable to her because its agents had allegedly punished another person (Lt. McMenemy) for taking an internal union complaint. Kern does not allege that any adverse employment action taken by the City was taken against her. Significantly, Spirt does not change the basic principle of standing, repeated in Warth

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[1] Plaintiff has argued in her briefs that "the law of the case" is that her state claims would be sufficient, should this Court recognize a federal claim. Although I do not recognize a federal claim in this action, I must state that neither this decision nor any prior decision is this case has considered viability of any of the state law claims pleaded by the plaintiff.

v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975), that plaintiffs "cannot rest [their] claim[s] to relief on the legal rights or interests of third-parties." Plaintiff has demonstrated no case where, as here, a plaintiff was allowed to recover or pursue a claim under Title VII where there was no direct connection between the defendant's actions and the claimed harm to the plaintiff. Moreover, in Spirt, LIU had contracted with the defendants to administer the annuity fund, thus delegating its responsibility to provide retirement benefits. By contrast, the City is not alleged to have been delegated any responsibilities by the Union relative to Kern or even that the City knew that Kern was employed by Local 1071. Finally, the Second Circuit held that it was relevant that participation in the funds was mandatory for all tenured faculty and that LIU shared administrative responsibilities over the funds. Here, the City is not alleged to have shared any administrative responsibility relative to Ms. Kern with Local 1071. She is not alleged to have been on the City's payroll, nor on their retirement plan, nor in any capacity in their employment records. The rationale in Spirt is limited to situations in which there is some reasonable nexus between the defendant and the plaintiff. Kern has alleged no connection between the defendants' alleged actions against Lt. McMenemy and any actionable wrong against her. Plaintiff's motion for reconsideration is denied.

3. Plaintiff's Motion to Supplement Record

While the Plaintiff's motions outlined above were pending, plaintiff made a motion to supplement the record in this case. This motion sought to include three items in the record of this case: (1) A copy of Lt. McMenemy's 50-h hearing transcript, (2) A copy of the Xerox Corporation's sexual harassment policy handbook, and (3) A copy of a newspaper article discussing alleged improprieties between former Rochester Fire Chief Ippolito and a uniform company. This motion is denied because all of these documents are irrelevant to the issues presented in this case. See also Federal

Rule of Evidence 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues. . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Accordingly, her motion to supplement the record is denied.

4. Eldridge's and Local 1071's Requests for Fees

As part of their responses to plaintiffs motions, defendants Eldridge and Local 1071 have both requested costs of their motions pursuant to 42 U.S.C. § 2000e-5(k). They have not provided any details about the costs incurred in responding to this motion. After considering these requests, I deny their application for fees.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
December 1 , 1994

DEC 3 1994

6:93-cv-06301

John R. Parrinello, Esq.
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400 Executive Office Bldg.
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FILED
93 NOV 23 - PM 4:23
U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff filed this action on June 28, 1993, alleging violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 and state law provisions arising from incidents which occurred while she was employed as a secretary by Rochester Firefighters Association, Inc., Local 1071, IAFF ("Local 1071"). All named defendants have moved to dismiss the action under Federal Rule of Civil Procedure 12(b). Plaintiff opposes these motions and moves to amend her complaint under Federal Rule of Civil Procedure 15 to allege a claim under the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, et seq. For

the reasons set forth below, I grant defendants' motions and deny the cross-motion with leave for plaintiff to renew her motion to file an amended complaint which comports with this decision.

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September, 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she alleges committed various acts of sexual harassment, and discrimination during the course of her employment. She specifically alleges that Mr. Cavuoto sexually assaulted her on December 30, 1992. She also alleges that, in retaliation for taking Ms. Kern's internal union complaint regarding this harassment, Rochester Fire Department Lt. John McMenemy (the Treasurer of Local 1071) was denied a promotion to Captain. Finally, she alleges that members of the Rochester Police Department investigating her criminal charges were friends of Mr. Cavuoto and that information of these charges was given to Mr. Cavuoto without first informing Ms. Kern, as she had been promised.

MOTION TO DISMISS OF THE CITY OF ROCHESTER, THE ROCHESTER FIRE DEPARTMENT, THE ROCHESTER POLICE DEPARTMENT, FIRE CHIEF CHARLES IPPOLITO AND DANIEL CAVUOTO

1. Section 1983 Claim

The City of Rochester (the "City"), Rochester Police Department ("RPD"), and Rochester Fire Department ("RFD") collectively move to dismiss the 42 U.S.C. § 1983 claim on the ground that Ms. Kern fails to state a claim against them. They correctly maintain that the § 1983 claim should be dismissed as to the City and its municipal agencies because the City cannot be held liable merely because it employs a wrongdoer. Municipalities and, by extension, municipal agencies such as RPD and RFD may be held liable under § 1983 only when the deprivation of rights is

caused pursuant to "a policy statement, ordinance, regulation, or decision promulgated by that body's officers." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). The Plaintiff alleges no facts even to suggest that any of the alleged deprivations of her civil rights were pursuant to any policy or custom of the RPD, RFD, or the City. The claims against the City, RPD, and RFD should be dismissed on that basis.

But more importantly, even a liberal reading of the factual allegations of the complaint fails to demonstrate an essential element of a § 1983 claim: that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law. "Color of state law" is an essential element of the § 1983 claim. This requirement is satisfied when a defendant "act[s] in his official capacity or while exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 50, 108 S.Ct. 2250, 2255 (1988). In determining whether the actions taken by Mr. Cavuoto were under color of state law, the Court must discern the source of Mr. Cavuoto's authority and whether such authority devolved from a grant of power by the state. Temple v. Albert, 719 F.Supp. 265, 267 (S.D.N.Y. 1989). Mere employment by a state or municipality, although relevant to determining whether a defendant's actions are under color of state law, does not conclusively establish state action. Polk County v. Dodson, 454 U.S. 312, 321, 102 S.Ct. 445, 451 (1981) (Public Defenders, although state employees, do not act under color of state law when representing their clients because the state lacks authority over their actions.)

The alleged facts, even when viewed in the light most favorable to Plaintiff, make clear that Mr. Cavuoto was not acting under color of state law. Ms. Kern does not allege that she was an employee of the City at any time (her complaint makes clear that she was employed at all times by Local 1071), nor does she allege facts that Mr. Cavuoto used his official authority as a Rochester Firefighter to commit any of the alleged unlawful acts.

The allegations in the complaint make clear that, although Mr. Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071 union president in his contacts with Ms. Kern and not pursuant to any official duties as a firefighter with the RFD. Therefore, because Ms. Kern fails to allege that Mr. Cavuoto was acting pursuant to any official duties or responsibilities under state law, i.e. as an active duty firefighter, the § 1983 claim against Mr. Cavuoto must be dismissed.

Plaintiff also claims that her civil rights were violated when RFD failed to promote Lt. John McMenemy in retaliation for taking Ms. Kern's internal complaint. Even if the failure to promote Lt. McMenemy violated § 1983, however, Ms. Kern lacks standing to assert such a violation. An allegation of injury to Lt. McMenemy does not state a cause for the violation of Ms. Kern's civil rights. Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third-parties.) Put simply, it was Lt. McMenemy's, not Ms. Kern's, civil rights that may have been violated in these circumstances.

Plaintiff also claims that her civil rights were violated because the individuals who investigated her internal complaint were friends of Mr. Cavuoto and that they improperly leaked the police report to him. Again, Ms. Kern fails to allege the critical requirement that the leak was pursuant to any official promulgation or policy of the City or its agencies. Monell, 436 U.S. at 690. Thus, she fails to state a claim for a civil rights violation on that basis as well. Ms. Kern simply fails to indicate how the act of employing persons who knew Mr. Cavuoto and were ordered to investigate the case or the subsequent alleged leaking of that information to Mr. Cavuoto could violate her civil rights.

Finally, the only unlawful action that plaintiff attributes to Fire Chief Ippolito was his alleged failure to promote Lt. McMenemy in

retaliation for his taking Ms. Kern's internal complaint. Again, Ms. Kern has no standing to claim relief for alleged wrongs that may have been committed against Lt. McMenemy. Therefore, inasmuch as Ms. Kern alleges no personal, redressable harm as a result of Chief Ippolito's alleged action, her claim on this ground must be dismissed.

2. The Conspiracy Claim Pursuant to § 1985(3)

Ms. Kern also alleges that Defendants Ippolito, Cavuoto, Eldridge and other unknown persons have conspired to deprive her of her civil rights in violation of 42 U.S.C. § 1985(3). She alleges that the defendants "interfered with plaintiff's right to complain about defendant Cavuoto's unlawful conduct, her right to due process of law and equal protection of the laws."

In order to state a conspiracy claim under § 1985(3), the complaint must contain more than conclusory allegations of conspiracy. "The Plaintiff must make some effort to provide some 'details of time and place and the alleged effect of the conspiracy.'" Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) (quoting 2A Moore's Federal Practice § 8.17[6] (2d Ed. 1992)). Vague or conclusory allegations that the defendants have engaged in a conspiracy to deprive Plaintiff of constitutional rights are properly dismissed. Id. Plaintiff makes only a conclusory allegation of conspiracy, providing no details about how the seven defendants named acted with any concert of purpose at all, much less with the purpose "to deprive plaintiff of and/or interfere with her rights."

The Supreme Court's most recent discussion of § 1985(3) was in Bray v. Alexandria Women's Health Clinic, --- U.S. ---, 113 S.Ct. 753 (1993). In reaching its conclusion, the Supreme Court summarized the precedent under § 1985(3) as requiring a showing that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Id.

at 758 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Assuming that women are a class that falls under the scope of § 1985(3) (a question that the Supreme Court left open in Bray), Bray makes clear that the infringement of the civil rights must be "aimed at" by the conspiracy — it must be "a conscious objective of the enterprise." Id. at 762. Although Ms. Kern pleads that Mr. Cavuoto deprived her of her civil rights, she makes no more than a conclusory allegation that there was a conspiracy to deprive her of her rights. Accordingly, I grant the motion by defendants City, RPD, RFD, Mr. Cavuoto, and Chief Ippolito to dismiss the § 1985(3) claims against them.

MOTION BY LLOYD ELDRIDGE TO DISMISS

Plaintiff alleges two federal claims against Mr. Lloyd Eldridge. The first of the claims names Mr. Eldridge as a co-conspirator in the deprivation of Ms. Kern's civil rights in violation of § 1985(3). The second is a claim under § 1986 for his failure to prevent or aid in preventing the commission of a violation of § 1985(3) by others, including Mr. Cavuoto.

Mr. Eldridge also moves to dismiss all federal claims against him for failure to state a cause of action. As explained above, the § 1985(3) claim should be dismissed for failure to allege a conspiracy with particularity. Ms. Kern has failed to plead details of time, place, and effect of the conspiracy as well as allege that the violation of Ms. Kern's civil rights was "aimed at" by the conspiracy. Bray, 113 S.Ct. at 762. I therefore dismiss the § 1985(3) claim against Mr. Eldridge for failure to state a claim. Furthermore, because I have dismissed the § 1985(3) claim for failure to state a claim, the § 1986 claim alleged against Mr. Eldridge must be dismissed as derivative. See Rodgers v. Lincoln Towing Service, 771 F.2d 194, 203 (7th Cir. 1985); see also Hahn v. Sargent, 523 F.2d 461 (lst Cir. 1975).

MOTION TO DISMISS BY LOCAL 1071

Local 1071 has moved separately to dismiss the § 1985(3) claim that Ms. Kern has made against it. As discussed above, the plaintiff has failed to allege the time, place, and effect of the alleged conspiracy sufficiently to state a claim under § 1985(3), nor has she alleged that the conspiracy was "aimed at" the violation of her civil rights. Bray, 113 S.Ct. at 762. For these reasons, the § 1985(3) claim against Local 1071 must also be dismissed.

MOTION BY PLAINTIFF TO AMEND COMPLAINT

Plaintiff also moves to amend her complaint to include a claim that the City, RFD, Local 1071, Mr. Cavuoto, and Chief Ippolito violated her rights under Title VII of the Civil Rights Act of 1964. Although she pleads in her complaint that she was expecting a right-to-sue letter rather than having actually received the letter, which is a jurisdictional prerequisite, this minor error in pleading was obviated by the plaintiff's later receipt of the letter.

Federal Rule of Civil Procedure Rule 15(a) directs district courts to allow amendments of pleadings "freely when justice so requires." Nevertheless, denying a request to amend is proper where such an amendment would be futile. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Ruffolo v. Oppenheimer & Co, 987 F.2d 129 (2d Cir. 1993). Here, plaintiff attempts to sue the City, RFD, and Chief Ippolito on the basis of Title VII, based solely on the fact that the City and RFD employed Mr. Cavuoto, who allegedly discriminated against Ms. Kern. As the City correctly points out in its brief, plaintiff has advanced no theory of "employment" under Title VII which could conceivably support her position that she is entitled to recover from the governmental agencies which employ a person who acts principally as an agent of an entirely separate employer (in this case Local 1071) when actions she complains of occurred during this collateral

employment relationship. Put simply, the alleged impropriety took place while Mr. Cavuoto was a union official and not while he was an on-duty firefighter. Furthermore, Ms. Kern has never alleged that she was an employee of the City or the RFD, or that the City, RFD, or Chief Ippolito was responsible for any employment actions against her as a result of her engaging in protected activities under Title VII.

Ms. Kern's reliance upon "third-party retaliation" cases is, moreover, misplaced. Those cases typically involve a single employer retaliating against one employee (or group of employees) for action protected under Title VII by another employee. Ms. Kern is attempting to hold a separate employer (RFD) responsible for allegedly retaliating against an entirely different employee (Lt. McMenemy) for taking an internal union grievance. No support in existing law for expanding Title VII to this limit is supplied by the plaintiff, nor could any be found. Therefore, her motion to amend to state a Title VII action against the City, RFD, and Chief Ippolito is denied as futile, because her proposed amended complaint fails to state a cause of action supported by the terms of Title VII and the relevant case law.

Finally, Ms. Kern's motion to amend to state a Title VII action against Local 1071 and Mr. Cavuoto is also denied as futile as she does not plead, nor is it obvious from the face of the amended complaint as presented, that Local 1071 is an employer of 15 employees, as is required for subject matter jurisdiction under the statute. See Shepherdson v. Local Union No. 401, 823 F.Supp. 1245 (E.D.Pa. 1993). While Ms. Kern generally alleges that Local 1071 "is an employer within the meaning of the laws against discrimination/retaliation," she fails to allege in the proposed complaint that Local 1071 employs more than 15 employees. Furthermore, the description of events in her complaint leads me to conclude that Ms. Kern was one of far less than 15 employees of Local 1071 during the operative time period. Furthermore, she

provides no allegations relating to the control of Local 1071 by the International Association of Fire Fighters which would, if sufficient control were alleged, allow the employees of the International to be counted as a single entity with Local 1071, thus providing the required jurisdictional minimum. See Shepherdson, 823 F. Supp. at 1245. Therefore, absent adequate allegation of this court's jurisdiction under Title VII, I deny the Plaintiff's motion to amend the complaint with leave to move to amend her complaint to state such a cause of action against Mr. Cavuoto and Local 1071.

MOTIONS BY ALL DEFENDANTS TO DISMISS STATE CAUSES

All Defendants have moved to dismiss the causes of action against them which arise under New York State law. As no claims remain over which this Court has original jurisdiction, I dismiss the state causes for lack of subject matter jurisdiction, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), 28 U.S.C. § 1367(c)(3), without prejudice to their reinstatement upon the filing of an amended complaint stating a valid federal cause of action.

OTHER MOTIONS

Plaintiff, perceiving a conflict of interest between John Parrinello's representation of both Local 1071 and Mr. Cavuoto, moves to disqualify Mr. Parrinello as counsel for Mr. Cavuoto. This motion is mooted by the dismissal of the complaint and will not be entertained at this time. For similar reasons, the motion by all defendants to stay discovery is mooted by the dismissal of the complaint.

CONCLUSION

The complaint is dismissed for failure to state a claim and Plaintiff's motion to file the amended complaint as submitted is denied at this time. She is, however, granted leave to move to file an amended complaint setting forth a valid cause of action under §

1985(3) and/or Title VII consistent with this opinion within 30 days of the date of this order.

WHEREFORE, the complaint is dismissed with leave to amend.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
November 23, 1993

Statutes Involved:

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy;; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States the party so injure or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 2000e Definitions

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States a

corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f) The term "employee" means an individual employed by an employer, except that the term "employee shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chose by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitution or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e-2 Unlawful employment practices

(c) Labor organization practices

It shall be an unlawful employment practice for labor organization-

(1) to exclude or expel from its membership or otherwise to discriminate against, any individual because of his race, color religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment an individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would

limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

U.S. Const. article I, section 8, cl. 18 Powers of Congress

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.

Supreme Court Rule 10 Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor full measuring the court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided important federal question in a way that conflicts with a decision by a state court of fast resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has

decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 15 Briefs in Opposition; Reply Briefs; Supplemental Briefs

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Federal Rule of Civil Procedure 15 Amended and Supplemental Pleading.

a. **AMENDMENTS**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the

adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, which ever period may be the longer, unless the court otherwise orders.

New York State Executive Law §292. Definitions

5. The term "employer" does not include any employer with fewer than four persons in his employ.

OPPOSITION

BRIEF

(5)

No. 96-1190

Supreme Court, U.S.
FILED
FEB 24 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester and CHARLES D. IPPOLITO

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit correctly hold that the petitioner failed to state a cause of action under 42 U.S.C. §1983 where the pleadings revealed that:

   a. none of the actions of which she complained were taken under color of state law;

   b. that the alleged actions of the union president were not pursuant to any municipal custom or policy; and

   c. the retaliation complained of by the petitioner was allegedly against a third party and not the petitioner?

2. Did the Court of Appeals correctly hold that the petitioner was not an employee of the city respondents for the purposes of the anti-discrimination and anti-retaliation provisions of Title VII where the pleadings established that the petitioner worked solely for the local firefighter's union, that the city respondents exercised no control over her or the terms of her employment and that they had no impact on her employment by the union?

3. Did the Court of Appeals properly dismiss the petitioner's conspiracy claim under 42 U.S.C. §1985(3) where there was no showing of the time and place of the alleged conspiratorial activity?

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SUMMARY OF ARGUMENT

The petitioner, who was a full-time employee of the City of Rochester firefighter's union, was not an employee of the City of Rochester and, therefore, can seek no redress against the City under Title VII for the alleged sexual harassment and discrimination by her employer, the union president. In addition, the alleged acts of the union president were done under his authority as union president and, consequently, were not under color of state law for purposes of 42 U.S.C. §1983.

PRELIMINARY STATEMENT

This brief is submitted on behalf of the respondents City of Rochester, the Fire Department of the City of Rochester, the Police Department of the City of Rochester and Charles D. Ippolito, individually and as Chief[1] of the City of Rochester Fire Department (hereafter "city respondents") in opposition to the petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

A. Facts

The plaintiff-petitioner, Wendy Kern (hereafter "petitioner") was hired on or about September 1, 1992 as a secretary by the Rochester (New York) Firefighters Association, Inc., Local 1071, International Association of Firefighters (hereafter "Local 1071" and "IAFF", respectively). Her immediate supervisor was Daniel Cavuoto, the president of Local 1071. Mr. Cavuoto was also a lieutenant in the Rochester Fire Department at the time of the incidents alleged in the complaint. However, as union president Cavuoto had been fully released by the city from any and all duties as a Rochester Fire Department employee so that he could devote

[1] Mr. Ippolito has since retired from this position.

the time he would otherwise have spent working for the city attending to his union responsibilities.

The petitioner alleges that from the date of her employment until December 30, 1992, she was sexually harassed and discriminated against by Cavuoto. The petitioner further alleges that on December 30, 1993, Cavuoto and his business partner, Lloyd Eldridge, encouraged her to drink an excessive amount of liquor at the offices of Life Safety, a business owned by Cavuoto and Eldridge. As a result of her inebriation, the petitioner allegedly lost consciousness and awoke to find herself partially disrobed and Cavuoto standing above her, naked below the waist. The petitioner did not go to the police or seek any medical intervention at that time.

On January 19, 1993, the petitioner complained about the December 30 incident to John McMenemy, the union treasurer, who was also a lieutenant in the Rochester Fire Department. On February 24, 1993, the petitioner and her counsel made an appointment to make a report to the Rochester Police Department about the incident. The petitioner subsequently related the incident to Investigators Salvatore Ruvio and Vito D'Ambrosio. The petitioner claims that she made the investigators aware of the sensitive nature of the allegations arid that they promised to notify her before contacting Cavuoto about the charges. Allegedly, Ruvio and D'Ambrosio were friends of Cavuoto's and did not disclose this supposed fact to her.[2]

On the evening of February 25, 1993, the petitioner's charges against Cavuoto supposedly became known in the Fire Department. At petitioner's request the union made arrangements the next day to place her on leave status from her job with full pay. The petitioner subsequently quit her job with the union.

The petitioner concedes that prior to December 30, 1992, she

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[2] Both detectives denied being friends with Cavuoto.

never complained about Cavuoto's conduct to anyone in the Rochester Fire Department and that she had no information to suggest that anyone in the Fire Department had any knowledge of Cavuoto's treatment of her. Nevertheless, the petitioner alleges that the city respondents supposedly knew of Cavuoto having made unwanted sexual advances to other women. As elucidated by Lt. McMenemy, Cavuoto allegedly had a "reputation for soliciting women for sex and/or sexually harassing them". Lt. McMenemy further averred that Cavuoto had a reputation for being a "pig" as to women and that he (Cavuoto) had stated that he "hires his secretary with fast hands and slow lips".

Finally, the petitioner alleged that Chief Ippolito retaliated against Lt. McMenemy by denying him a promotion based upon the fact that he took the petitioner's complaint.

B. Procedural History

The petitioner's complaint was filed in the District Court for the Western District of New York on June 28, 1993 . The four causes of action asserted against the city respondents were based upon the alleged violation of 42 U.S.C. §§ 1983, 1985(3) and the New York Human Rights Law (N.Y. Executive Law, Art. 15, §290, *et seq.*).

By a Notice of Motion dated July 19, 1993 the city respondents[3] moved to dismiss the complaint on the grounds that it failed to state a cause of action. Similar relief was sought by the remaining respondents. The petitioner both opposed the motions and moved to amend her complaint to add a cause of action pursuant to Title VII of the Civil Rights act of 1964 against the city respondents.

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[3] At the time of the motion, Cavuoto was represented by counsel for the City of Rochester, who moved for dismissal on his behalf as well as on behalf of the other city respondents. Cavuoto is now represented by separate counsel.

On November 23, 1993, the District Court (Telesca, C.J.) issued a Decision and Order resolving the parties' respective motions. The Court held that the petitioner's claims under §§1983 and 1985(3) were legally insufficient and should be dismissed. Since there were no pending federal claims to which the state law causes of action could attach, the Court also dismissed those claims for lack of subject matter jurisdiction. Finally, the Court denied as futile the petitioner's motion to amend as against the city respondents, holding that there was no viable cause of action against them under Title VII. However, the Court held that the petitioner could, consistent with the decision, move to file an amended complaint setting forth a valid cause of action under §1985(3) and/or Title VII against the remaining respondents.

By a Notice of Motion dated January 18, 1994, the petitioner moved for reconsideration of the Court's November 23, 1993 decision and for leave to add a Title VII cause of action against the non-city respondents. On December 1, 1994, the. District Court denied the motion for reconsideration but ordered a hearing to determine whether or not Local 1071 was an "employer" as defined under Title VII. A hearing on this issue was held on August 14, 1995. On October 5, 1995, the District Court issued a Decision and Order holding that Local 1071 did not have the requisite number of employees to constitute an "employer" within the meaning of Title VII. Based upon this finding, the District Court dismissed the complaint in its entirety.

On November 6, 1995, the petitioner filed her Notice of Appeal to the Court of Appeals for the Second Circuit from all three of the foregoing orders. In a unanimous decision, the Court of Appeals affirmed the District Court's judgment dismissing the petitioner's claims (see *Kern v. City of Rochester. et al.*, 93 F.2d 38 [2d Cir. 1996]). A subsequent petition for rehearing and rehearing *en banc* was denied on October 15, 1996.

ARGUMENT

POINT I
THE COURT OF APPEALS CORRECTLY HELD THAT THE CITY RESPONDENTS WERE NOT LIABLE TO THE PETITIONER UNDER TITLE VII FOR THE ALLEGED SEXUAL HARASSMENT BY CAVUOTO.

A. The Title VII Discrimination Claims

The first argument advanced by the petitioner is that the court below erred in denying as futile her motion for leave to amend her complaint to add a Title VII cause of action against the city respondents. Specifically, the petitioner avers that the absence of an employer-employee relationship between herself and the City of Rochester is not fatal to her proposed cause of action. We respectfully submit that the Court of Appeals was clearly correct in its determination.

Under Title VII, it is an "unlawful employment practice" for an employer:

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . .; or
>
> to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" 42 U.S.C. §§2000e-(a)(l), 2000e-3(a).

The federal courts have repeatedly stressed that the intent of Title VII is to prohibit employers from engaging in these activities with respect to their employees:

> "Title VII is an *employment* law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers" *Tadros v. Coleman*, 717 F. Supp. 996, 1002 (S.D N.Y. 1989) (emphasis in original).

The court in *Tadros* went on to hold that:

> "It is axiomatic that a would-be plaintiff must have rendered to the defendant some kind of service to sue under Title VII. That service, moreover, must have been one from which the putative employer willingly derived a benefit" *Id*, at 1003.

Similarly, in *Hill v. New York City Board of Education*, 808 F.Supp. 141 (E.D.N.Y., 1992), the court held that the:

> ". . . fundamental predicate for Title VII liability [is] the existence of an *employment* relationship between the one who discriminates and the one who finds himself the victim of that discrimination" (emphasis in original) *Id*, at 146.

See also, *Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir., 1987), *cert. denied*, 484 U.S. 987, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987):

> "[T]he word 'employee', however broadly defined, is still 'employee', and circumscribed by meanings reasonably related to that word. Drafters of the statute gave no indication that they were departing from the common discourse of the republic when fashioning a word to be understood and applied by its citizens" *Id*, at 276.

See also, *Stetka v. Hunt Real Estate Corp.*, 859 F.Supp. 661 (W.D.N.Y., 1994) (to prevail on a Title VII claim plaintiff must prove existence of employment relationship).

In determining whether an individual is an employer, a number of courts have held that an inquiry must be held into the economic reality of the relationship. Such an inquiry includes:

> "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); see also, *Carter v. Dutchess County Community College*, 735 F.2d 8 (2d Cir. 1984).

Applying the foregoing standard, the petitioner is obviously not an employee of the City of Rochester. It is undisputed that the city respondents had no authority to hire or fire the petitioner, to supervise her work schedule or conditions of employment, to determine her rate or method or payment and maintained no records with respect to her employment. Thus, by the traditional economic reality test, as well as by reference to any commonly understood meaning of the word the petitioner was not an employee of the city respondents.

The reed to which the petitioner clings is the line of cases which have held that, in certain narrowly defined circumstances, the definition of "employer" may be expanded to include "any party who significantly affects access of any individual to employment opportunities" (*Vanguard Justice Society Inc. v. Hughes*, 471 F.Supp. 670, 696 [D.Md. 1979]). However, an analysis of these cases reveals that they are clearly distinguishable from the case at bar.

In *Spirt v. Teachers Insurance and Annuity Assn.*, 691 F.2d 1054, 1063 [2d Cir. 1982], *vacated and remanded* 463 U.S. 1223, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983), the plaintiff was a tenured college professor who claimed that her university and two retirement annuity plans (TIAA and CREF) engaged in sex discrimination by employing sex-segregated mortality tables. Participation in the plans was mandatory and the university shared administrative responsibility over the funds. In determining TIAA-

CREF's status as an employer under Title VII, the court stressed that these retirement plans were the delegees of the university's responsibility to manage their employee's retirement plans and were performing this function on the university's behalf. The court further stressed that the intertwined nature of the relationship between TIAA-CREF and the university warranted classifying both of them as employers:

> ". . . TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities . . . that they must be deemed an 'employer' for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF" *Id*, at 1063.

The petitioner sought to rely on *Spirt* in the Court of Appeals. However, as that Court instructed the petitioner, the differences between the facts in *Spirt* and those in the present case are manifest:

> "Local 1071, unlike LIU in *Spirt*, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071 — and therefore her job — would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer". *Kern, supra*, 45 [2d Cir. 1996].

[2d Cir. 1996].

The petitioner can find no solace in the other cases upon which she relies (see Petition, p. 11-13). In most of the cases cited, the plaintiffs were individuals who were independent doctors or nurses who, because they were denied privileges at hospitals, were actually denied the opportunity to work (see *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 [D.C. Cir. 1973] [hospital barred private duty nurses who were working independently for patients from working at hospital]; *Doe v. St. Joseph's Hospital*, 788 F.2d 411 [7th Cir. 1986] [non-employee physician denied ability to admit and treat patients at hospital]; *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870 [6th Cir. 1991], *cert. denied* 112 S.Ct 658 [1991]; *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 [11th Cir. 1988]; *Gomez v. Alexian Bros. Hospital of San Jose*, 698 F.2d 411 [9th Cir. 1983]). The other cases cited by petitioner similarly address cases where an individual was actually denied the opportunity to work, or, like the plaintiff in *Spirt*, was discriminated against by a party who was closely intertwined with an employer (see *Puntolillo v. New Hampshire Racing Commission*, 375 F.Supp. 1089 [D.N.H. 1974] [plaintiffs were driver-trainers of race horses who were denied ability to race and earn a living at the race tracks controlled by the state regulatory agency]; *Carparts Distribution Center. v. Automotive Wholesaler's Ass'n of New England. Inc.*, 37 F.3d 12 [lst Cir. 1994]) (sole stockholder of company discriminated against by self-funded medical insurance plan). In the present case, the City of Rochester did not prevent the petitioner from working, either directly or indirectly. Similarly, the city and the union are clearly not united in interest and performing services for each other, as in *Spirt* and *Carparts*. Thus, these cases cannot avail the petitioner.

Despite the foregoing, the petitioner persists in her claim that the city respondents were her "employers" under Title VII on the grounds that they allegedly "significantly affected" her

employment by their various alleged actions and inactions (see *Spirt, supra*, at 1054; Petition, p. 14). Even assuming, *arguendo*, the truth of these allegations, they simply do not rise to the level of interference recognized by the courts as necessary to warrant classifying a defendant as an employer for the purposes of Title VII. Irrespective of what the city respondents did or did not do, the petitioner was not prevented from working in any manner, nor was her access to employment impeded. Even assuming that discrimination occurred, this simply does not make the city respondents employers. As the courts have recognized, the fact that someone has been discriminated against does not, *ipso facto*, make them an employee:

> "To suggest that Congress intended the provisions of Title VII . . . to reach all situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes in to *business* discrimination statutes. If this were the case, then we must question why Congress bothered to limit each statute's reach to employment practices. The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes" *Wheeler v. Main Hurdman, supra*, at 275-276.

Based upon the foregoing, we respectfully submit that this Court should reject the petitioner's invitation to expand the definition of "employer" to such unprecedented limits. The city respondents were not the petitioner's employer under any reasonable definition of the term, or under any standard recognized by any of the federal courts. As both courts below correctly held, there is simply no reasonable nexus between the petitioner and the city respondents sufficient to warrant classifying them as the petitioner's employer for Title VII purposes.

B. The Title VII Retaliation Claims

The next argument advanced by the petitioner is that she should have been permitted to add a Title VII cause of action which would have alleged that the city respondents retaliated against her by not promoting Lt. McMenemy. As the court below correctly held, this argument is wholly without merit.

The so-called "retaliation" provisions of Title VII make it an unlawful employment practice to retaliate against an employee for engaging in activities protected by that title (see 42 U.S.C. §2000e-3[a], quoted at p.6, *supra*). The prima facie elements of retaliation are:

> "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an *employment action adverse to the plaintiff*; (4) that there was a causal connection between the protected activity and the adverse employment action" *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987) (emphasis supplied).

The obvious purpose of the statute is to prevent employers from retaliating against their employees for engaging in Title VII activities. The fatal flaw in the petitioner's argument is that the petitioner was not an employee of the City of Rochester. The city did not, and, indeed, could not, take any employment action adverse to the petitioner. As such, the foregoing provisions of Title VII are clearly inapplicable.

The petitioner broadly alleges that "Title VII prohibits reprisals against victims of discrimination as well as those who assist with their complaints and/or those who are closely related to the victim/complainant" (Petition, p. 15, citing *McDonnell v. Cisneros*, 84 F.3d 256 [7th Cir. 1996], *EEOC v. Ohio Edison Co.*, 7 F.3d 541 [6th Cir. 1993] and *Wu v. Thomas*, 863 F.2d 1543 [11th Cir. 1989]). While it is true, as the petitioner argues, that the courts have

recognized the viability of a Title VII action for "third-party" retaliation, they have never made such actions available to persons similarly situated to the petitioner. Thus, if an entity engages in retaliatory activities against a person which substantially affect *that person's employment,* the retaliating entity may be deemed an "employer" for purposes of Title VII (see *LeMasters v. The Christ Hospital*, 777 F. Supp. 1378 [D.Oh. 1991] [hospital retaliated against doctor by suspending his admitting privileges]; *Save v. St. Vrain Valley School Dist. Re-1J*, 785 F.2d 862 [10th Cir. 1986] [retaliatory non-renewal of teacher's contract for engaging in union activities]; *Christopher, supra* [hospital retaliated against private duty nurse working for individual doctors, thereby rendering her unable to work]. Thus, while a non-employee may sue for retaliation against him/her *if his/her employment has been substantially effected*, such is simply not the case here. As the District Court correctly found, the alleged retaliation was against Lt. McMenemy, not the petitioner, and she has utterly failed to demonstrate how her employment was substantially effected by any allegedly retaliatory actions taken against Lt. McMenemy.

Absent the existence of an employer-employee relationship between the employer and the person retaliated against, the courts have uniformly rejected attempts by non-employee interlopers to avail themselves to Title VII protections. Thus, in *Asklar v. Honeywell. Inc.*, 95 F.R.D. 419 (D.Conn. 1982), the plaintiff was the widow of a former employee of the defendant who was allegedly discriminated against in violation of the Age Discrimination in Employment Act ("ADEA"; 29 U.S.C. §§621-624). Noting that the anti-retaliatory provisions of the ADEA were "nearly identical" to those in Title VII (*Id*, at 424), the court dismissed the action for lack of standing on the part of the non-employee widow, stating:

> "No court has extended the scope of a retaliation provision beyond the bounds of an employer-employee relationship" *Id*, at 435.

Similarly, in *Hale v. Marsh*, 808 F.2d 616 (7th Cir. 1986), the plaintiff was an OSHA employee who assisted an Army employee with a complaint of racial discrimination against the Army. When the Army sent a letter of complaint to OSHA regarding the plaintiff's activities, he sued the Army under the anti-retaliation provisions of Title VII. The court held that a Title VII plaintiff could not base such an action upon retaliation by another person's employer against the plaintiff:

> "The interest he asserts is too tenuous, legally and factually, to warrant an adventurous interpretation of the retaliation provisions of Title VII" *Id*, at 620, citing *Asklar, supra*.

In sum, no case has ever extended Title VII retaliation protection to non-employees such as the petitioner. Thus, we submit that the court below correctly concluded that she lacked standing to assert any retaliation against Lt. McMenemy as a basis for Title VII relief.

POINT II

THE CITY RESPONDENTS ARE NOT LIABLE TO THE PETITIONER FOR CAVUOTO'S ALLEGED CONDUCT UNDER 42 U.S.C. §1983.

The petitioner's next assignment of error is that the Court of Appeals should not have dismissed her claims that the city respondents violated her civil rights, as proscribed by 42 U.S.C. §1983. We respectfully submit that the Court of Appeals properly concluded that these claims, even if assumed to be true, did not state a cause of action under this statute.

Section 1983 provides a civil action for the deprivation of rights by officials of various governmental entities:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . .

> subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

Relying upon this statute, the petitioner argues that the city respondents are liable to her for the alleged sexual harassment and discrimination by Cavuoto. In addition to asserting that the city respondents are directly liable for Cavuoto's actions, the petitioner also argues that the city respondents are liable to her since they allegedly knew that Cavuoto was a "womanizer" and did not take any prior action to discipline him. The petitioner also asserts violations of her First Amendment and due process rights. As the Court of Appeals correctly held, these arguments are wholly without merit.

The petitioner's attempt to premise municipal liability on the acts of Cavuoto should be summarily denied. In order to proceed on a claim pursuant to §1983, the petitioner must plead and prove a violation of her rights made "under color of law". This requirement can only be satisfied when a defendant's conduct constitutes the:

> ". . . misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . ." *National Collegiate Athletic Association v. Tarkanian*, 109 S.Ct. 454, 461 (1988), quoting *United States v. Classic*, 313 U.S. 299, 326 (1941) (emphasis added).

Stated in other terms, the color of state law requirement is satisfied when a defendant:

> "act[s] in his official capacity or when exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50, 108 S.Ct. 2250, 2255 (1988).

In order to determine whether Cavuoto was acting under color of state law, the source of his authority and whether or not such authority devolved from a grant of power from the state must be determined (*Temple v. Albert*, 719 F.Supp. 265, 267 [S.D.N.Y. 1989]). The mere fact that the defendant was employed by a state or municipality does not necessarily mean that his actions are taken under color of state law where the state has no authority over his actions (*Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445, 451 [1981]).

In the present case, the petitioner struggles mightily to find some official basis for Cavuoto's actions. Thus, she variously argues that:

1. the city promoted Cavuoto to his supervisory position;

2. the city chose to permit Cavuoto to work in the union office while paying him his regular pay;

3. the incidents complained of occurred during Cavuoto's work day while on pay from the city;

4. the incidents occurred in the union office where Cavuoto met with city employees

None of this avails the petitioner. The city may have promoted Cavuoto to his position *in the Fire Department*, but they did not elect him union president, an election he could have won irrespective of his rank. In addition, irrespective of whether the city paid Cavuoto or not, his work in the union office was not at the city's behest and was not subject to the city's control. This is not altered by the fact that the incidents occurred during normal business hours, or in a place where Cavuoto met with other city employees. Whether they did or not, the salient point is that the incidents complained of occurred while Cavuoto was performing solely union, not city, functions. The incident involved the union president and the union's secretary. Thus, Cavuoto's authority devolved from his position as union president, not as city

firefighter. As the Court of Appeals properly held, Cavuoto was not acting in any official capacity when he allegedly sexually harassed the petitioner. For this reason, the petitioner's attempt to make the city respondents liable for Cavuoto's actions should be rejected.

The petitioner next argues that the city respondents should be liable to her because they allegedly knew that Cavuoto was a "womanizer" and did not discipline him. However, an examination of the facts asserted by the petitioner in support of this claim reveal that they are woefully insufficient to put the city on notice that Cavuoto posed a threat to her. Thus, the complaint states, in wholly conclusory fashion, that "defendant Ippolito and other city employees have knowledge of defendant Cavuoto making uninvited and unwanted sexual advances to other women". When the city petitioners made their motion to dismiss, the only proof offered in support of this allegation was an affidavit from Lt. McMenemy which stated that:

> "I am aware of Lt. Cavuoto's reputation for soliciting women for sex and/or sexually harassing them. Mrs. Kern's predecessor, Irma Eichner complained to me that Lt. Cavuoto was hitting on her for sex frequently.
>
> Lt. Cavuoto's reputation for being a 'pig' as to women is well known in the City Fire Department. Other fire fighters have told me that Lt. Cavuoto has stated to them on the job that he hires his secretary with fast hands and slow lips".

These allegations, reprehensible as they are, do not advance the petitioner's theory that the city respondents ignored complaints about Cavuoto's behavior. While Lt. McMenemy may have been aware of Cavuoto's reputation for sexual harassment, no proof was ever submitted that he ever brought this hearsay information to the attention of any of Cavuoto's supervisors.[4] Similarly, there is no proof that he, or anyone else, ever came forward with Ms.

[4] In support of this, former Chief Ippolito affirmed that he was unaware of any mistreatment of the petitioner or any other female by Cavuoto.

Eichner's allegations. The alleged fact that Cavuoto had a reputation for being a "pig" or that he hired his union secretaries in a sexually inappropriate manner suffers from the same flaw: there is no proof that anyone ever complained to Cavuoto's supervisors. As the Court of Appeals accurately observed:

> "[T]here is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever complained about Cavuoto to the City or to Cavuoto's superiors at the RFD" *Kern, supra* at 44.

Finally, the petitioner argues, in wholly conclusory terms, that the city respondents violated the petitioner's First Amendment and due process rights. These claims are without merit. The complaint fails to state in any manner how her First Amendment rights were violated. A bare assertion in a complaint that some unspecified conduct somehow infringed upon a plaintiff's First Amendment rights is too remote and speculative to state a justiciable case or controversy (*Spear v. Town of West Hartford*, 954 F.2d 63, 67 [2d Cir 1992]).

Similarly defective are the petitioner's claims that the city respondents violated her due process rights when they assigned the detectives who allegedly knew Cavuoto. A due process violation may occur when police action "shocks the conscience" *Rochin v. California*, 34 U.S. 165, 172, 173, 72 S.Ct. 205, 96 L.Ed. 18 (1952); *White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979). Even assuming the facts as stated by petitioner, the actions complained of simply do not rise to this level. First, the police investigation targeted Cavuoto, not the petitioner. The petitioner does not explain how such a criminal investigation, directed at another party, implicated any of her due process rights in any manner. In addition, the petitioner seeks to dramatize the facts by claiming that her life was jeopardized by the disclosure of the

existence of the police investigation without prior notice to her. However, this claim cannot withstand even cursory scrutiny. The petitioner was Cavuoto's employee. He knew her phone number and, presumably, her address. Obviously, if Cavuoto wanted to assault the petitioner, he could have done so at a time and place of his choosing. Thus, if the petitioner's life was placed in jeopardy as a result of her going to the police, the timing of the disclosure of that fact to Cavuoto was irrelevant. At a minimum, such disclosure does not rise to the level of a due process violation.[5]

POINT III

PETITIONER'S COMPLAINT FAILS TO SUFFICIENTLY ALLEGE A CLAIM FOR CONSPIRACY UNDER 42 U.S.C. 1985(3).

In order to sufficiently allege a conspiracy, the complaint must contain more than mere conclusory allegations. *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir 1993). The complaint should afford some "details of time and place of the alleged effect of the conspiracy." *Id*, at 99 (quoting 2A Moore's Federal Practice p 8.17 [6] at 8-109 to 8-110. [2d ed. 1992]). Complaints containing conclusory, vague or general allegations concerning a conspiracy to deprive someone of their civil rights are properly dismissed. *Id*. Since the petitioner's complaint is clearly deficient under this standard, it was properly dismissed.

In any event, petitioner's 1985 claim was properly dismissed as there is no allegation nor evidence that the city respondents' conduct was aimed at and for the purpose of denying petitioner her constitutional rights. *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039, (2d Cir 1993). This Court has indicated

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[5] Compare with *White v. Rochford, supra*, where police arrested an individual for drug dealing and left his infant nephews without adult protection in an abandoned automobile on the side of the road on a cold evening.

that the "conscious objective of the (conspiracy) enterprise" must be to impair the right in question. *Bray v. Alexandria Clinic*, 506 US 263, 113 S. Ct. 753, 122 L.Ed. 2d 34, 50 [1993]). The mere fact that an alleged conspiracy has the effect of a constitutional violation is not enough. The very purpose of the conspiracy must be aimed at denying the protected right. *Id.* The city respondents must have acted, at least in part, for the very purpose of producing the deprivation of rights. *Id.* As the District Court observed, no such allegation was made by the petitioner.

The city respondents further assert that the petitioner's claim under 42 U.S.C. 1985 was correctly dismissed for failure to comply with *Bray's* requirement that the conspiracy be motivated by animus against a particular "class" of individuals. The stated intent of this requirement was to limit the speculative extension of Section 1985(3) from innumerable tort plaintiffs. The Court of Appeals for the Second Circuit amplified this Court's pronouncements in *Town of West Hartford, supra*, at p. 1046, noting that simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with would convert Section 1985 into a "general federal tort law" which the animus requirement specifically seeks to avoid. The Court went on, quoting Justice Blackmun from *Carpenters v. Scott*, 463 U.S. 825, that the class "cannot be defined simply as the group of victims of the tortious action."

The complaint in the instant action contains the bare allegation that the acts of the city respondents were "committed with a (sic) invidiously discriminatory animus against woman as a class". What is apparent is that petitioner's claim does not involve a class at all. The petitioner was the sole female employee of the local firefighters union. She is attempting to turn her alleged tort case into a federal conspiracy case by using magic words and unfounded allegations. In *Bray*, this Court found that the section of 1985(3) here in issue did not apply to prevent Operation Rescue

from conspiring to prevent women from getting abortions across the country. Certainly if 1985(3) does not apply to a situation where there is open and notorious conspiratorial action on a nationwide basis, there can be little doubt that it is not applicable to the situation at bar. In any event, since this Court has never reached the issue, we submit that §1985(3) does not apply to the class alleged in the complaint.

Based upon the foregoing, we submit that the Court of Appeals properly affirmed the dismissal the petitioner's cause of action under 42 U.S.C. §1985(3).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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